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REPORTS OF THE SUPREME COURT

OF THE

UNITED STATES.

UNITED STATES REPORTS,

SUPREME COURT.

VOL. 107.

CASES

ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

OCTOBER TERM, 1882.

REPORTED BY

WILLIAM T. OTTO.

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JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

HON. MORRISON R. WAITE.

ASSOCIATES.

HON. SAMUEL F. MILLER.	HON. STEPHEN J. FIELD.
HON. JOSEPH P. BRADLEY.	HON. JOHN M. HARLAN.
HON. WILLIAM B. WOODS.	HON. STANLEY MATTHEWS.
HON. HORACE GRAY.	HON. SAMUEL BLATCHFORD.

ATTORNEY-GENERAL.

HON. BENJAMIN HARRIS BREWSTER.

SOLICITOR-GENERAL.

HON. SAMUEL FIELD PHILLIPS.

ALLOTMENT, ETC., OF THE JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES,

AS MADE APRIL 3, 1882.

NAME OF THE JUSTICE, AND STATE FROM WHENCE APPOINTED.	NUMBER AND TERRITORY OF THE CIRCUIT.	DATE OF COMMISSION, AND BY WHOM APPOINTED.
CHIEF JUSTICE.	FOURTH.	1874.
HON. M. R. WAITE, Ohio.	MARYLAND, WEST VIRGINIA, VIRGINIA, N. CAROLINA, AND S. CAROLINA.	Jan. 21. PRESIDENT GRANT.
ASSOCIATES.	FIRST.	1881.
HON. HORACE GRAY, Massachusetts.	MAINE, NEW HAMPSHIRE, MASSACHUSETTS, AND RHODE ISLAND.	Dec. 20. PRESIDENT ARTHUR.
	SECOND.	1882.
HON. SAM'L BLATCHFORD, New York.	NEW YORK, VERMONT, AND CONNECTICUT.	March 27. PRESIDENT ARTHUR.
	THIRD.	1870.
HON. J. P. BRADLEY, New Jersey.	PENNSYLVANIA, NEW JERSEY, AND DELAWARE.	March 21. PRESIDENT GRANT.
	FIFTH.	1880.
HON. WM. B. WOODS, Georgia.	GEORGIA, FLORIDA, ALABAMA, MISSISSIPPI, LOUISIANA, AND TEXAS.	Dec. 21. PRESIDENT HAYES.
	SIXTH.	1881.
HON. STANLEY MATTHEWS, Ohio.	OHIO, MICHIGAN, KENTUCKY, & TENNESSEE.	May 12. PRESIDENT GARFIELD.
	SEVENTH.	1877.
HON. J. M. HARLAN, Kentucky.	INDIANA, ILLINOIS, AND WISCONSIN.	Nov. 29. PRESIDENT HAYES.
	EIGHTH.	1862.
HON. S. F. MILLER, Iowa.	MINNESOTA, IOWA, MISSOURI, KANSAS, ARKANSAS, NEBRASKA, AND COLORADO.	July 16. PRESIDENT LINCOLN.
	NINTH.	1863.
HON. S. J. FIELD, California.	CALIFORNIA, OREGON, AND NEVADA.	March 10. PRESIDENT LINCOLN.

AMENDMENT TO THE RULES TOUCHING APPEALS FROM THE COURT OF CLAIMS.

Ordered, That Rule 1, in reference to appeals from the Court of Claims, be, and the same is hereby, made applicable to appeals in all cases heretofore or hereafter decided by that court under the jurisdiction conferred by the act of June 16, 1880, c. 243, "to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes."

[Promulgated May 7, 1883.]

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REPORTS OF THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1882.

UNITED STATES *v.* ERIE RAILWAY COMPANY.

The court denies an application for rehearing in this case, decided at the present term, 106 U. S. 327.

PETITION for rehearing.

The Solicitor-General for the United States.
Mr. William D. Shipman, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

When this case was argued, no special claim was made for a judgment based on the currency value of the pounds sterling at the time the taxes sued for ought to have been paid, and for that reason a judgment was ordered for the present value of pounds sterling in lawful money. We are now asked to rehear the case for the purpose of considering that question.

The company was liable for taxes of five per cent on the amounts of interest paid. As the payments were all made in pounds sterling, the computations must necessarily be on that basis. Sect. 9 of the act of July 13, 1866, c. 184, made it the duty of the company to return a list of the prescribed taxes to the assessor. In making up such lists the act required that it should be declared whether the amounts were stated

according to their values in legal-tender currency or in coined money. When stated in coined money, it was the duty of the assessor to reduce them to their equivalent in legal-tender currency, according to the value of coined money in currency for the time covered by the returns. All lists furnished the collectors by the assessors were required to "contain the several amounts of taxes assessed, estimated, or valued in legal-tender currency only."

In *Savings Bank* v. *United States*, 19 Wall. 227, 240, it was decided that a suit at law might be maintained for the recovery of a tax on interest paid, even though no list had been returned and no assessment made; and in the opinion it was said: "No other assessment than that made by the statute was necessary to determine the extent of the bank's liability. An assessment is only determining the value of the thing taxed, and the amount of tax required of each individual. It may be made by the designated officers or by the law itself. In the present case the statute required every savings bank to pay a tax of five per cent on all undistributed earnings made, or added during the year to their contingent funds. There was no occasion or room for any other assessment. This was a charge of a certain sum upon the bank, and without more it made the bank a debtor."

In the present case no list was returned by the company and no assessment made by the assessor. Consequently no list was ever furnished the collector, and the amount to be paid in currency was never officially ascertained. This suit is, therefore, for the debt which the company owes, to wit, five per cent of the pounds sterling it has paid as interest on its bonds. If the debt had been paid at the time it was due, the officers chargeable with the collection could have accepted nothing but legal-tender currency, and to an amount equivalent to the value of the coin which was owing. In other words, the debt was in the nature of an obligation to pay in coin, but which the government would not receive in anything but legal-tender currency of equal value with the coin. This is a suit for the recovery of that debt as a debt. If there were now any difference in value between coin and currency, it would have been proper to render the judgment for the coin or its equivalent in

currency. *Gregory* v. *Morris*, 96 U. S. 619. As there is no such difference, a general judgment for the amount due is all that is necessary. The amount of the debt was always a fixed sum in pounds sterling. The provision for the estimation of the value of this debt in legal-tender currency was, in our opinion, a regulation of the mode of collection, and not a change in the amount of the obligation. As promptness was required in the payment of taxes, and the amount to be paid in currency would not ordinarily exceed the value of the coin which was due, it was thought proper by the government to require its officers to make collections in currency. For that reason it was provided that in making out the tax-lists the amount necessary to discharge coin taxes in currency should be set down, rather than the amount of the coin that was owing. In this way there would be less opportunity for confusion in the accounts between the government and its officers.

As upon this application we have had the benefit of a printed brief by the Solicitor-General on behalf of the United States, and upon full consideration are satisfied that the judgment as it stands is right, notwithstanding the claim that is now made, the application for a rehearing is

Denied.

EMBRY *v.* PALMER.

1. The Supreme Court of the District of Columbia is a court of the United States, and its judgment, when suit is brought thereon in any State of the Union, is, under the legislation of Congress, conclusive upon the defendant, except for such cause as would be sufficient to set it aside in the courts of the district.
2. A. recovered judgment in that court against B. and C., who, when sued thereon in a State court, filed their bill to enjoin the collection of so much thereof as they claimed was in excess of the amount due on the original cause of action, and alleged, as a ground of relief, matter available as a defence in the action at law, which they were not prevented from setting up by accident, or by the fraud of A., unconnected with the negligence of themselves or agents. The court perpetually enjoined A. from suing on the judgment on their paying into court that amount. They did so, and A. received it. The decree was affirmed by the court of last resort in the State. *Held*, 1. That, according to the law then in force in the District of Columbia, the

bill not being sufficient to authorize the relief granted, the decree does not give the required effect to the judgment, and this court has jurisdiction to re-examine it on a writ of error. 2. That A., by accepting the amount so paid, is not estopped from prosecuting that writ.

ERROR to the Supreme Court of Errors of the State of Connecticut.

James H. Embry, administrator of Robert J. Atkinson, deceased, brought, in January, 1872, his action in the Supreme Court of the District of Columbia, against Stanton and Palmer, to recover compensation for professional services alleged to have been rendered, in their behalf and at their request, by his intestate, in prosecuting and recovering for them the amount of certain claims in their favor against the United States. In this action they appeared and defended, and judgment was rendered against them upon a verdict for $9,185.18. Upon a writ of error, issued out of this court, this judgment was affirmed, upon grounds which appear in the report of the case. *Stanton* v. *Embry*, 93 U. S. 548.

Subsequently, in 1877, Embry brought his action upon this judgment against the defendants, in the Superior Court for New London County, Connecticut, where they resided, in order to obtain judgment and execution thereof in that State. Thereupon they filed their petition in equity in the same court, the object and prayer of which were to obtain a perpetual injunction, restraining him from prosecuting his action upon that judgment, or in any manner enforcing it against them, upon their payment of $2,296.25, which they alleged was as much as he was equitably entitled to on account of the causes of action, on which the judgment had been rendered.

The grounds of relief alleged in this petition may be shortly but sufficiently stated, as follows, viz.: That the claim in question was for collecting from the United States the sum of $45,925.91, under a special written agreement for a compensation to Atkinson of five per cent on that amount, the existence of which was well known to Embry when he brought his suit in the Supreme Court of the District of Columbia; that when he, as administrator of Atkinson, first presented to Stanton and Palmer the account for payment, it was for $2,296.29, being at that rate; that they, claiming to have a good defence

against it, declined to pay it, when he thereupon brought suit for that amount, in Connecticut, in 1871, which he discontinued in 1872, and, during its pendency, brought the action in which the judgment complained of was rendered, in which he ignored the special agreement, and sued upon a *quantum meruit;* that Palmer, one of the defendants, at the time of the trial was absent from the District of Columbia, and was not notified of the day of trial in time to be present; that Stanton, though present in Washington at the time, was unable to attend the trial on account of sickness; that since the trial Stanton, on examination, had found among his papers two letters from Atkinson, in which the latter expressly acknowledged the existence of the special contract for fees at five per cent, as claimed, but they were discovered too late for use on the trial; and that Embry, in suppressing his knowledge of the existence of this contract, and in procuring a judgment for a larger sum, was guilty of fraud, which made it inequitable in him to enforce the judgment to its full extent.

A general demurrer to this petition, reserved to the Supreme Court of Errors of Connecticut for its advice, was overruled, that court being of opinion that the petition was sufficient. Its decision is reported in 46 Conn. 65, treating the case made in the petition as one of fraud in procuring an unjust judgment admitted by the demurrer.

Embry then filed his answer to the petition, in which he denies that he made out the account as originally presented at the rate of five per cent on the amount collected, to conform to any agreement between the parties, but because he found from Atkinson's books that he had charged at that rate in other cases, and without considering the difference of value in the services rendered in them; and that Atkinson kept no copies of the letters written to the petitioners. He claims that the question, whether there was any contract between the parties, and if so, what were its terms, was fully tried and finally decided in the action, which resulted in the judgment complained of, and which he sets up as an estoppel. He denies that he then or at any time knew of any contract between the parties as to fees, and claims that if the petitioners failed in that action to substantiate a defence, it was through their own laches, and not by reason of any fraud on his part.

In accordance with the practice in that State, the cause was referred to a committee, whose report of the facts constitutes part of the record, from which the following extract is taken: —

"At [the time of] the trial of this case at Washington neither Stanton nor Palmer was present in court. Palmer was at Stonington; his attendance might have been secured by reasonable diligence, if such attendance had been deemed very important. Stanton was ill at his hotel in Washington, — too ill to attend the trial. His counsel asked for a postponement on that account; but no affidavit was offered in support of the motion, and it was denied. The petitioners' counsel appears to have been content to proceed with the trial in the absence of his clients. He had full and, as it turned out, undue confidence in the legal defences, which appear by the record to have been set up at the trial, and took it for granted that in no event could more be recovered than $2,296.29. The letters of Atkinson of February 18, 1870, and May 7, 1870, recognizing the special agreement for five per cent on claim D, were not in Washington at the trial there; they were received by Stanton, the active partner, at a time when his mind was much depressed; they were stored for safe keeping at his home in Stonington, Connecticut, and the contents had escaped his recollection; they were not found by him until after the trial and disposal of the case at the general term.

"After the commencement of the suit at Washington he made search for all letters and papers relating to the case, and placed in possession of his counsel such as he found; and he then supposed that he had found and placed in the hands of counsel all the letters and papers pertaining to the matters in suit. As bearing on the question how it happened that these letters escaped the recollection of Stanton, it appears that for several reasons the attention of the petitioners was not alive to the importance of being prepared at the trial in Washington with the proof of the special agreement which the letters furnished: 1. Because the petitioners took it for granted that the full extent of the plaintiff's claim at the trial would be $2,296.29, that being the amount of the claim D presented through Mr. Pratt; and it did not occur to them that a larger amount might be claimed under the *quantum meruit* count.

2. Because their counsel had undue confidence in legal defences against the entire demand, and therefore did not apprehend the full importance to the interests of his clients of being prepared with proof of the special agreement.

"As to specification 7th in the petition, Atkinson, while living, had full knowledge that the amount due him was but $2,296.29, on a special contract for that amount, and he, if living, could not, with a good conscience, have presented a claim for a greater amount. Embry, the administrator, knew that Stanton and Palmer claimed a special contract, and was willing before trial was brought to settle on that basis; but his claim in court on a *quantum meruit* was not on his part an intentional *suggestio falsi*. He did not know that the claim was unfounded; the full proof of the special agreement was not in his possession, and had not been fully brought to his knowledge."

What decree should be passed in the cause upon this report was reserved for the action of the Supreme Court of Errors; which court, after argument, advised that the prayer of the petition be granted, on condition that the petitioners pay to the respondent the sum of $2,296.29, within a reasonable time to be fixed, with interest thereon from March 10, 1871, which was accordingly so ordered; and the said sum of money having thereupon been paid by the petitioners to the attorney of the respondent, and received by him, with the interest thereon, it was ordered and decreed by the Supreme Court that he be enjoined, under a penalty of $20,000, payable to them, to abstain and desist from the further prosecution of his suit upon the judgment, and from instituting any other suit or action thereon, or from executing or in any manner enforcing the same against them.

Proceedings in error were taken in due form to review this judgment in the Supreme Court of Errors of the State, it being assigned for error "that the decree is in contravention of art. 4, sect. 1, of the Constitution of the United States, and sect. 905, c. 17, tit. 13, of the Revised Statutes of the United States, in that it enjoins the prosecution of a suit on a judgment of the Supreme Court of the District of Columbia," and "that the decree enjoins the collection of a judgment of a court of the United States."

The opinion of the Supreme Court of Errors in passing upon the case as presented by the report of the committee, and advising as to the decree to be rendered thereon, is reported in *Stanton* v. *Embry*, 46 Conn. 595.

The final decree entered in pursuance thereof, and affirmed by that court, is now, by writ of error, brought here by Embry for review.

Mr. Edward Lander and *Mr. Amos L. Merriman* for the plaintiff in error.

Mr. Jeremiah Halsey and *Mr. Charles W. Hornor* for the defendants in error.

MR. JUSTICE MATTHEWS, after stating the case, delivered the opinion of the court.

A suggestion is made in argument that Embry is estopped to prosecute this writ to the reversal of the decree below, because it appears that the amount of money ordered by it to be paid to him as a condition of relief granted has been accepted by him. It is said that this is a release of errors. Without entering upon a discussion of the general question, it is sufficient for the present purpose to say that no waiver or release of errors, operating as a bar to the further prosecution of an appeal or writ of error, can be implied, except from conduct which is inconsistent with the claim of a right to reverse the judgment or decree, which it is sought to bring into review. If the release is not expressed, it can arise only upon the principle of an estoppel. The present is not such a case. The amount awarded, paid, and accepted constitutes no part of what is in controversy. Its acceptance by the plaintiff in error cannot be construed into an admission that the decree he seeks to reverse is not erroneous; nor does it take from the defendants in error anything, on the reversal of the decree, to which they would otherwise be entitled; for they cannot deny that this sum, at least, is due and payable from them to him. But in every point of view the objection is met and answered by the decision of this court in the case of *United States* v. *Dashiel*, 3 Wall. 688.

The jurisdiction of the court invoked by this writ of error is conferred by sect. 709, Rev. Stat., it being a case in which a title or right is claimed under an authority exercised under the

United States, and the decision of the State court being in denial of the title or right so asserted. It was decided in *Dupasseur* v. *Rochereau*, 21 Wall. 130, that such a question is undoubtedly raised whenever "a State court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and of the parties." The judgment, which is the subject-matter of the litigation, is that of the Supreme Court of the District of Columbia, which is a court of the United States. The question we have to determine is whether the Supreme Court of Errors of the State of Connecticut, in the decree complained of, gave to that judgment its due effect.

Section 905, Rev. Stat., which embodies the original act of May 26, 1790, c. 11, and the supplement thereto of March 27, 1804, c. 56, provides that the records and judicial proceedings, not only of the courts of any State, but also of any Territory, or of any country subject to the jurisdiction of the United States, authenticated as therein prescribed, "shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the State from which they are taken;" which, by supplying the ellipsis, must be taken to mean, such faith and credit as they are entitled to in the courts of the State, Territory, or other country subject to the jurisdiction of the United States from which they are taken.

So far as this statutory provision relates to the effect to be given to the judicial proceedings of the States, it is founded on art. 4, sect. 1, of the Constitution, which, however, does not extend to the other cases covered by the statute. The power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the Constitution, such as those which declare the extent of the judicial power of the United States, which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the government of the United States, or in any department or officer thereof, and which declare the supremacy of the authority of the national government within the limits of the Constitution. As part of its general authority, the power to give effect to the judgments

of its courts is coextensive with its territorial jurisdiction. That the Supreme Court of the District of Columbia is a court of the United States, results from the right of exclusive legislation over the District which the Constitution has given to Congress. Accordingly, the judgments of the courts of the United States have invariably been recognized as upon the same footing, so far as concerns the obligation created by them, with domestic judgments of the States, wherever rendered and wherever sought to be enforced. *Barney* v. *Patterson*, 6 Har. & J. (Md.) 182; *Niblett* v. *Scott*, 4 La. Ann. 246; *Adams* v. *Way*, 33 Conn. 419; *Womack* v. *Dearman*, 7 Port. (Ala.) 513; *Pepoon* v. *Jenkins*, 2 Johns. (N. Y.) Cas. 119; *Williams* v. *Wilkes*, 14 Pa. St. 228; *Turnbull* v. *Payson*, 95 U. S. 418; *Cage's Ex'rs* v. *Cassidy*, 23 How. 109; *Galpin* v. *Page*, 3 Sawyer, 93, 109.

The rule for determining what effect shall be given to such judgments is that declared by this court, in respect to the faith and credit to be given to the judgments of State courts in the courts of other States, in the case of *M'Elmoyle* v. *Cohen*, 13 Pet. 312, 326, where it was said: "They are record evidence of a debt, or judgments of record, to be contested only in such way as judgments of record may be; and, consequently, are conclusive upon the defendant in every State, except for such causes as would be sufficient to set aside the judgment in the courts of the State in which it was rendered."

The question then arises, what causes would have been sufficient in the District of Columbia, according to the law then in force, to have authorized its courts to set aside the judgment recovered there by Embry against Stanton and Palmer?

This is answered by the decision of this court, upon the point, in the case of *Marine Insurance Company of Alexandria* v. *Hodgson*, 7 Cranch, 332. That was a bill in equity, filed in a court of the District of Columbia, perpetually to enjoin the collection of so much of a judgment at law recovered in the District as was in excess of an amount claimed to be the sum equitably due. The grounds of relief alleged were that a fraud had been practised upon the underwriters in a valued policy of marine insurance, by an over-valuation of the ship, and that the complainant had been prevented from making the defence

at law. Chief Justice Marshall, delivering the opinion of the court, affirming the decree of the court below dismissing the bill, stated the rule as follows: —

"Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery. On the other hand, it may with equal safety be laid down as a general rule that a defence cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of that court that the defence ought to have been sustained at law. In the case under consideration the plaintiffs ask the aid of this court to relieve them from a judgment, on account of a defence, which, if good anywhere, was good at law, and which they were not prevented, by the act of the defendants, or by any pure and unmixed accident, from making at law."

This was held to be the law prevailing in the District of Columbia, not by reason of any local peculiarity, but because it was a general principle of equity jurisprudence. It was repeated in *Hendrickson* v. *Hinckley*, 17 How. 443, where the rule was condensed by Mr. Justice Curtis into the following statement: "A court of equity does not interfere with judgments at law, unless the complainant has an equitable defence, of which he could not avail himself at law, because it did not amount to a legal defence, or had a good defence at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents." *Creath* v. *Sims*, 5 How. 192; *Walker* v. *Robbins*, 14 id. 584. It was reaffirmed in *Crim* v. *Handley*, 94 U. S. 652, and in *Brown* v. *County of Buena Vista*, 95 id. 157.

This is the doctrine recognized and applied by the Supreme Court of Errors of Connecticut in the case of *Pearce* v. *Olney*, 20 Conn. 544. That was a bill in equity to restrain the collec-

tion of a judgment recovered in New York, upon the ground that the complainant had a good defence at law to the action, which he was prevented from making by the fraud of the defendant. It was there said by that court: "It is well settled that this jurisdiction will be exercised, whenever a party, having a good defence to an action at law, has had no opportunity to make it, or has been prevented by the fraud or improper management of the other party from making it, and by reason thereof a judgment has been obtained which it is against conscience to enforce." Then stating that the action was founded on an alleged contract, on which the complainant was not personally liable, having been made by him as agent for a corporation, and that this was known to the party suing, the court continue: "If this was all, the plaintiff would have no remedy, however unjust it might be to compel him to pay that judgment. Still, as he was duly served with process in that suit, it was his duty to make defence in it; and an injunction ought not to be granted to relieve him from the consequences of his own neglect."

The court then proceeds to show that he not only had a good defence, but that it was his intention to make it, which he would have done had he not been led by the assurances of the attorney for the plaintiff in the action to believe that it had been abandoned, so that its subsequent prosecution, without further notice, operated as a surprise, tantamount to a fraud; and that, consequently, there was no ground on which to impute laches to the complainant in not defending himself at law.

A subsequent action was brought in New York upon the same judgment by an assignee of the plaintiff, to which the defendant set up as a bar the Connecticut decree perpetually enjoining its execution, which, by the judgment of the Court of Appeals of New York, was sustained. *Dobson* v. *Pearce*, 12 N. Y. 156. The court said: "The decree of the Court of Chancery of the State of Connecticut, as an operative decree, so far as it enjoined and restrained the parties, had and has no extra-territorial efficacy, as an injunction does not affect the courts of this State; but the judgment of the court upon the matters litigated is conclusive upon the parties everywhere and in every forum where the same matters are drawn in question.

It is not the particular relief which was granted which affects the parties litigating in the courts of this State; but it is the adjudication and determination of the facts by that court, the final decision that the judgment was procured by fraud, which is operative here, and necessarily prevents the plaintiff from asserting any claim under it." p. 167.

The same rule, as to the jurisdiction in equity to enjoin the enforcement of judgments at law, was declared by the Supreme Court of Errors of Connecticut in the case of *Carrington* v. *Holabird*, 17 Conn. 530, in these words: "This jurisdiction will be exercised where to enforce a judgment recovered is against conscience, and where the applicant had no opportunity to make defence, or was prevented by accident, or the fraud or improper management of the opposite party, and without fault on his own part."

To the same effect is the case of *Borland* v. *Thornton*, 12 Cal. 440, where the subject is discussed and the authorities cited.

These, then, are the principles which should have governed the Supreme Court of Errors of Connecticut in the proceedings and judgment now under review. It remains to ascertain whether they were in fact applied in its dealing with the judgment sought to be enforced by the plaintiff in error.

No question is made of the right of that court to entertain the jurisdiction to enjoin proceedings upon the judgment, notwithstanding it was the judgment of a court of the United States. It had jurisdiction of the person of the plaintiff in error, who was himself seeking the aid of the courts of that State in his suit at law upon the judgment for the purpose of enforcing it.

Nor is any inquiry opened, upon this writ of error, as to any matter of fact found in the record before us. The facts, as ascertained and acted upon by the State court, are assumed to be true. They are contained in the report of the committee appointed to hear the evidence and report its conclusions of fact, which were accepted by the court, and they are not the subject of any exception.

The Supreme Court of Errors of Connecticut state the grounds of their judgment in the report of the case, *Stanton*

v. *Embry*, 46 Conn. 595, and hold that upon its circumstances it comes within the rule laid down in *Pearce* v. *Olney*, 20 id. 544, already noticed. The conduct of the plaintiff in error, alleged as the ground for granting the relief decreed, is, that he "unintentionally gave them (the complainants) every reason for thinking that he did not believe that he had any right to ask for a judgment for a larger sum, and, of course, that he would not; he unintentionally led them to believe and act upon the belief, that the only loss which could possibly ensue from either a partial or a total omission of preparation for trial would be the sum of $2,296.25." The solitary fact upon which these inferences rest is, that the plaintiff in error originally presented an account for payment, claiming that sum, as a commission at the rate of five per cent upon the amount collected, and the complainants refusing to pay any part of it, on the ground of defences which applied to the whole of it, he brought his first suit in Connecticut against them, and in his declaration joined a special count on an agreement for this rate of compensation, with a general count upon a *quantum meruit*. The declaration in the action, in which judgment was rendered by the Supreme Court of the District of Columbia, contained two similar counts. It is argued from this that the claim for $10,000 damages, appropriate to the *quantum meruit* count, could only have been regarded as a form of pleading, not calculated to remove from the minds of the defendants sued "the effect produced by the precise and explicit statement of the bill of particulars;" which, regarding as obtained presumptively from the papers of the decedent, they had a right to treat as "equivalent to a declaration that those papers furnished positive evidence that there was a contract calling for payment at that rate;" that the plaintiff in error by "no act or word gave any intimation that he considered himself entitled to or intended to claim more;" and that all this was "calculated to and did in fact produce the belief on their part that no more would in any event be asked of the court than to assess the damages according to the terms of the contract."

It is admitted, however, that the plaintiff in error did not know of the alleged special contract; that he did not intend to give to the defendants in error any assurances on the subject,

and that he did not know that they were relying upon what they now allege has misled them.

In all this there is certainly no fraud; in fact, there is not enough to suggest a fault on the part of the plaintiff in error. He presented an account, which, it is now confessed, for them, if not by them, that the defendants in error ought at the time to have paid. This they refused to do, denying all liability for any amount, on the ground that no legal claim could arise for services, such as were rendered, no matter how valuable they had been. Suit was then brought upon the claim, both upon an express and an implied contract. It was contested at every point. The parties were adversaries, and there is no ground whatever for any claim on the part of the defendants in error, that they were relying upon assurances of any character upon the part of Embry. If they took anything for granted, it was upon their own responsibility and at their own risk. They neither expected nor feared a recovery against them for any excess beyond the contract rate, because they were confident they would defeat it altogether. Embry was an administrator. He had sought to obtain payment without litigation, and failed. It was his duty to sue for and recover whatever the law would give him. He owed no duty to his adversaries, except the opportunity of defence. That they have enjoyed, if not improved; and if it has not been as available as it would have been, in case they had limited themselves, as they claim their opponent should have done, to the special contract, which they now insist was binding upon both him and them, it was, as found in this record, in part at least, "because their counsel had undue confidence in legal defences against the entire demand, and, therefore, did not apprehend the full importance to the interests of his clients of being prepared with proof of the special agreement." That agreement they sought to avoid on the ground that it was illegal and immoral to contract for any compensation for the services rendered; and having deliberately staked their case upon that single issue, they seek to impute to their adversary the responsibility of their own mistake.

The laches of the defendants in error is equally manifest. One of them was absent from the trial; the report of the

committee states that "his attendance might have been secured by reasonable diligence, if such attendance had been deemed very important." The other was in Washington, but too ill to attend the trial. His counsel asked a postponement on that account; but, as the report continues, "no affidavit was offered in support of the motion, and it was denied. The petitioners' counsel appears to have been content to proceed with the trial in the absence of his clients. He had full and, as it turned out, undue confidence in the legal defences which appeared by the record to have been set up at the trial, and took it for granted that in no event could more be recovered than $2,296.29." There were two letters from Atkinson to the defendants in error in their possession, and not known to the plaintiff in error, expressly referring to the special agreement as fixing the rate of compensation, which might have been produced on the trial, but were not. They had escaped the recollection of the active partner, Stanton, who, for the preparation of the defence, had placed in the hands of his counsel in Washington all the papers which he supposed related to the subject of the suit. The letters referred to were not found by him until after the trial and disposition of the case in the Supreme Court of the District of Columbia. It is entirely clear from this statement that the defendants in error are chargeable with carelessness and want of diligence in not making and sustaining the defence on the ground of an express agreement for a fixed rate of compensation. It is fully accounted for by the other facts in the case. The report of the committee states that they were "not alive to the importance of being prepared at the trial in Washington with the proof of the special agreement which the letters furnished;" and for the reason that they took it for granted, without sufficient grounds, as we have already seen, that no recovery could be had for a larger amount, and this was based chiefly on their overweening confidence in their ability to defeat the recovery altogether.

But this is not all. The question whether there was not a special agreement limiting the compensation, as appears by the record in the case, was left to the jury upon evidence submitted. It was one of the points of the issue, and was so regarded by both parties. The counsel for the defendants in

error asked an instruction to the jury on the subject, and the court did instruct the jury in reference to it. After the verdict, a motion for a new trial was made on two grounds, first, that the damages were excessive, and, second, "that since the trial evidence vital to the case has been discovered." That motion was overruled, and an appeal was taken to the general term, where the judgment was affirmed. The motion for a new trial does not disclose what new evidence had been discovered, nor was any affidavit filed setting out its materiality, the circumstances of its discovery, and the reasons why it could not have been produced at the trial. There is no reason to doubt but that the evidence in question consisted of the very letters referred to.

It thus appears that after the trial, and after the consequences of the failure of the defendants in error to make good the defence now relied on had become manifest, they had the opportunity to bring the very matter to the attention of the Supreme Court of the District, and did in fact appeal to its discretionary power to grant a new trial for reasonable and sufficient cause. The motion for a new trial was made March 17, 1873, was not overruled at special term till April 19, 1873, and the appeal to the general term was not disposed of until Oct. 27, 1873, and in fact, owing to an irregularity in the entry of judgment, the verdict was under the control of the court until Sept. 28, 1874. During this interval there was ample time in which to present the facts and the application, and all illusions as to the intentions of the plaintiff in error had been dispelled by the trial and verdict. If it was not brought forward, it was from pure neglect. If it was, as it appears to have been, a court of competent jurisdiction has passed upon the very matter sought to be again litigated in the courts of Connecticut. The judgment of the Supreme Court of the District of Columbia refusing to grant a new trial was final. It was not, for that cause, subject to be reviewed on an appeal or a writ of error in any superior jurisdiction, and, for the same cause, it is not to be reviewed elsewhere. In *Marine Insurance Company* v. *Hodgson*, *supra*, the court had refused to permit the defendant to file the additional pleas raising the defence which was the basis of the application for relief in equity.

The court, when the original case was before it on a writ of error, said: "This court does not think that the refusal of an inferior court to receive an additional plea, or to amend one already filed, can ever be assigned for error. This depends so much on the discretion of the court below, which must be regulated more by the particular circumstances of every case, than by any precise and known rule of law, and of which the Supreme Court can never become fully possessed, that there would be more danger of injury in revising matters of this kind than what might result now and then from an arbitrary or improper exercise of this discretion." 6 Cranch, 206, 217. In *Crim* v. *Handley*, 94 U. S. 652, 659, it was said: "Nor does the allegation that one of his witnesses was sick during the examination, that it impaired his recollection and rendered him incapable of stating material facts within his knowledge, afford any sufficient support to the present application. Accidents of the kind occasionally occur in the course of the trial; but the plain remedy for such an embarrassment is an application to the court to postpone the trial or to continue the case, as the circumstances may require. Applications of the kind, if well founded, are seldom or never refused; but if a party elects to proceed and take his chance of success, he cannot, if the verdict and judgment are against him, go into equity and claim to have the judgment enjoined. If a witness is too unwell to testify understandingly, the proper remedy for the party is to move for a postponement of the trial; and if he elects to proceed and is unsuccessful, his only remedy is a motion for new trial to the court where the accident occurred."

The Supreme Court of Errors of Connecticut rest their judgment upon another ground, which it is proper to examine and consider. It may be stated as follows: That Atkinson, himself, if alive, could not have obtained a judgment, except upon his special contract, without such a suggestion of a falsehood as would have made it unconscionable for him to retain it; that the administrator, representing him, stands in no different position, as he is seeking to enforce a judgment, which his intestate could not equitably do, and that his having "failed to come to the knowledge of the truth as to the debt, and in ignorance misled the court into the rendition of a wrongful judg-

ment, does not destroy the right of the petitioners to have the wrong corrected now that it is pointed out."

But, in our opinion, this view cannot be maintained. It seems to constitute the plaintiff the guardian, not only of his own rights, but also of his adversaries, and to relieve them from the obligation of taking any care of themselves. We are not prepared to say, that, if Atkinson, in his lifetime, had presented his account for the amount now admitted to be due upon the contract, and had been told by Stanton and Palmer that they repudiated all liability on the ground that his services were illegal and against public policy, and therefore not entitled to compensation at all, he would have been guilty of any breach of law or morals, in insisting upon whatever the law would award for their actual value. Certainly, he was not bound, after that, to confine his claim to the limits of a contract which the other parties refused either to recognize or perform; and if, on suit brought, he left them to use it as a defence, if they saw fit, or to waive it for the chance of defeating his recovery altogether, we know of no principle of equity which would forbid it. It is to be remembered that there is nothing unconscionable or oppressive in the judgment itself, which is the subject of the present complaint. It represents, by the adjudication of a competent judicial tribunal, having full jurisdiction of the parties and the controversy, the reasonable, actual value of beneficial services rendered by Atkinson to the defendants in error. No fraud or unfairness was practised by the plaintiff in error in procuring it. The defendants in error had abundant opportunity to make the defence they now urge, and if they failed to do so, it was altogether their own fault. The judgment is conclusive between the parties, upon all the points made in the present suit, in the jurisdiction where it was rendered, and was entitled to be so regarded in the courts of Connecticut. In restraining further proceedings upon it, in the terms of the decree under review, the Supreme Court of Errors of that State have not given it that due effect to which, under the authority of the Constitution and laws of the United States, it is entitled. In that respect, there is manifest error in its decree, to the prejudice of the plaintiff in error, for which it must be reversed, and the cause remanded to

the Supreme Court of Errors of the State of Connecticut, with instructions to reverse the decree of the Superior Court within and for the county of New London, and to direct that court to render a decree dismissing the bill. It is accordingly

So ordered.

BURGESS v. SELIGMAN.

1. By a statute of Missouri, stockholders of a corporation at its dissolution are liable for its debts; but it is provided that no person holding stock as executor, administrator, guardian, or trustee, and no person holding stock as collateral security, shall be personally subject to such liability, but the persons pledging such stock shall be considered as holding the same, and liable; and the estates and funds in the hands of executors, &c., shall be liable. *Held*, 1. That persons to whom a corporation pledges its stock as collateral security are within the exemption of the statute. 2. That certificates of the stock absolute on their face, issued in trust or as collateral security to a creditor, may be shown to be so held by evidence *in pais*. 3. That the person holding such stock in trust, or as collateral security, is not, by his voting thereon, estopped from showing that it belongs to the company, and that he holds it as collateral security.
2. The Supreme Court of Missouri, after the Circuit Court had decided this case, made a contrary decision against the same stockholders, at the suit of another plaintiff, holding that the clause of exemption in the statute does not extend to persons receiving from the corporation itself stock as collateral security. *Held*, that this court is not bound to follow the decision.
3. The courts of the United States, in the administration of State laws in cases between citizens of different States, have an independent jurisdiction coordinate with that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws.
4. Where, however, by the course of the decisions of the State courts, certain rules are established which become rules of property and action in the State, and have all the effect of law, — especially with regard to the law of real estate and the construction of State constitutions and statutes, — the courts of the United States always regard such rules as authoritative declarations of what the law is. But where the law has not been thus settled, it is their right and duty to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence: and when contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions of the State tribunals, or when there has been no decision, the courts of the United States assert the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be given by the State courts after such rights have accrued.

5. But even in such cases, for the sake of harmony and to avoid confusion, the courts of the United States will lean towards an agreement of views with the State courts, if the question seems to them balanced with doubt.
6. Acting on these principles of comity, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the State courts.
7. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it is their duty to exercise an independent judgment in cases not foreclosed by previous adjudication.
8. A judgment entered by consent for a specific amount, subject to any credits which the defendant may produce vouchers for, is good as between the parties themselves and their privies.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The case is stated in the opinion of the court.

Mr. John P. Ellis and *Mr. Benjamin H. Bristow* for the plaintiff in error.

Mr. Joseph H. Choate, *Mr. James O. Broadhead*, and *Mr. H. H. Harding* for the defendants in error.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is an action brought by the plaintiff, Burgess, against J. & W. Seligman & Co., as stockholders of the Memphis, Carthage, and Northwestern Railroad Company, under a statute of the State of Missouri to recover a debt due to him by the company. The plaintiff, in his petition, alleges that on the 5th of November, 1874, judgment was rendered in his favor against the corporation by the District Court of Cherokee County, Kansas, for $73,661, which remains unsatisfied; that in December, 1874, the corporation was dissolved; and that the defendants, at the date of the dissolution and of the judgment, were, and still are, stockholders of the corporation to the amount of $6,000,000, on which there is due and unpaid $1,000,000; and he demands judgment for the amount of his debt. Joseph Seligman, the principal defendant, answered, denying that the defendants were ever stockholders, or subscribers to the stock, of the corporation, and setting forth cer-

tain facts and circumstances (stated in the findings) under which the stock alleged to be theirs was merely deposited in their hands by the corporation in trust for a temporary purpose by way of collateral security, to be returned when that purpose was accomplished.

The cause was tried by the court, and judgment was rendered for the defendants on certain findings of fact; and the question here is, whether the facts as found are sufficient to support the judgment.

The principal facts upon which the case must turn are substantially the following: —

The Memphis, Carthage, and Northwestern Railroad Company was a corporation organized under the general laws of Missouri, with an authorized capital of $10,000,000. On the 10th of March, 1872, a contract in writing was entered into between the corporation and J. & W. Seligman & Co. (the defendants), which is set forth in the findings. In the recitals of this contract it was stated that certain municipal subscriptions, in the shape of bonds, to the amount of $645,000, had been obtained in aid of its construction; and that a portion of the road (27 miles) was already graded, bridged, and tied, and the right of way obtained, and all paid for by the proceeds of said subscriptions, and that the company now sought additional capital for procuring iron and equipment for the road by the sale of its first-mortgage bonds: it was, therefore, agreed that the railroad company should furnish the capital necessary to completely prepare the road for the iron, and would execute and deposit with the defendants their entire issue of first-mortgage bonds, to wit, $5,000,000, and a majority of their capital stock authorized to be issued, "said stock to remain in the control of said party of the second part [J. & W. Seligman & Co.] for the term of one year at least." The latter agreed to purchase two thousand tons of railroad iron under the railroad company's direction, and from time to time to make advances of cash during the completion of the road, not exceeding $200,000 (including the amount paid for iron), and to receive interest thereon at the rate of seven per cent per annum until reimbursed by sale of the bonds. They were to have the privilege for the term of twelve months of calling any portion of the

$5,000,000 of bonds at the rate of seventy cents currency and accrued interest less two and a half per cent; and if more bonds were sold than enough to iron the road, they should advance funds to purchase rolling-stock $2,000 per mile, the balance to remain with them on deposit on interest at the rate of call loans to pay any deficiency in net earnings of the road to meet demands for interest on the bonds. If the bonds, or part of them, could not, for any unforeseen cause, be negotiated during the next twelve months, the company were to repay to J. & W. Seligman & Co. all moneys advanced by them with interest at the rate of seven per cent per annum and a commission of two and a half per cent on all bonds returned. This is the purport of the written agreement.

On the 1st of May, 1872, a trust deed was executed by the company on its railroad and appurtenances to Jesse Seligman and John H. Stewart, trustees, to secure the company's bonds. On the 11th of May, 1872, the following resolution of the directors was passed: "It is ordered by the board of directors that in making negotiations for money with J. & W. Seligman & Co., certificates for a majority of the capital stock of this company be issued to the said J. & W. Seligman & Co., *to hold in trust* for the period of twelve months, and that such certificates be signed by the president and secretary, with the corporate seal of this company affixed." A stock certificate for sixty thousand shares, or $6,000,000, was accordingly issued in the usual form to J. & W. Seligman & Co. This certificate was delivered to the defendants, but the court finds that they never subscribed for the stock, nor agreed to do so, and obtained it only in the manner set forth. The list of stockholders on the stock-book of the company, required by law to be kept, contains the names of certain townships which contributed aid to the road, and several individuals, including J. & W. Seligman, but not the amount of shares held. The stock transfer-book (also required by law) contained the same list, with date, number of shares, and amount carried out opposite to each name. The name of J. & W. Seligman appeared therein as follows: —

NAMES.	RESIDENCE.	DATE.	NO. OF SHARES.	AMOUNT IN DOLLARS.
J. & W. Seligman.	New York, N. Y.	Dec. 20, 1872.	60,000, sixty thousand (held in escrow).	6,000,000, six millions.

The court further found that shortly after the contract of March 14, 1872, Joseph Shippen, an attorney, of St. Louis, saw and examined its provisions, and a few days after told Burgess (the plaintiff) of the contract, and that thereby the Seligmans were to have control of the road and of the stock and bonds, and told Burgess it would be well for him to have a talk with Joseph Seligman before entering into contract with the railroad for its construction. Burgess accordingly saw Seligman, and testifies that the following conversation ensued: —

"I told him I had been constructing on that Carthage road, and that I understood he was interested in the road now, and I would like to talk to him on that matter; that this company owed me — or Cunningham, who was the president of the corporation — that he owed me then some money for work I had done between there and Pierce City, and I wanted to know what the prospect was for pushing the work forward, the means of getting the iron, and so on, and he said: 'I think the best thing you can do is to go on with the work westward, and we will have ample means to get hold of the local bonds.' It seems Cunningham had represented to him that there was local means enough to grade the road, and he suggested to me then that I would be safe in going on and entering into such a contract, and then he mentioned that he thought it would be better for all parties if the road was built and the work prosecuted westward."

Afterwards, on June 14, 1872, Burgess entered into a contract with the railroad company for the construction of the road from Carthage, Mo., to Independence, Kansas. He immediately began work under the contract, and so continued until the fall of 1873.

The bonds of the company to the amount of $864,000 were issued, and were negotiated and sold by J. & W. Seligman

& Co., they themselves becoming holders of over $400,000 thereof.

The stock issued to them was voted on by *proxy* at two successive annual meetings for election of directors.

The company being unable to meet its interest on the bonds, the road and property were delivered to the trustees of the mortgage and sold in December, 1874, and Joseph Seligman and Josiah Macy, as a bondholder's committee, became purchasers thereof, and the railroad corporation was dissolved in conformity with the laws of Missouri about the same time.

On the 5th of November, 1874, Burgess obtained judgment in the District Court of Cherokee County, Kansas, against the railroad corporation, for work and materials under his contract, for the sum of $73,661, which judgment recited that it was entered by agreement, with a stipulation that it would be entitled to a credit of the amount which had been paid by the railroad company to sub-contractors and laborers of the plaintiff, when the exact amount thereof should have been ascertained and proper vouchers furnished. No credits, however, were claimed. The present action was brought to recover the amount of this judgment.

The findings also set out the contract made by Burgess and his associate with the railroad company, 14th June, 1872, for constructing the road, by which it appeared that they agreed to take their pay in township bonds, so far as the same should be furnished.

Upon these facts the court gave judgment in favor of the defendants. Burgess brings the case here by writ of error.

The statutory provision upon which the action is founded is the twenty-second section of article 1 of the act of Missouri relating to private corporations, which declares as follows: "If any company, formed under this act, dissolve, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution without joining the company in such suit, and if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution for the recovery of the portion of such debt for which they were liable." 1 Wagner's Statutes, c. 37.

By sect. 9 of art. 2 of the same chapter, it is enacted as follows: "No person holding stock in any such company as executor, administrator, guardian, or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as a stockholder of such company, but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly, and the estates and funds in the hands of such executor, administrator, guardian, or trustee shall be liable, in like manner and to the same extent, as the testator or intestate, or the ward or person interested in such fund, would have been if he had been living and competent to act, and held the stock in his own name."

The first question for consideration is whether the plaintiff's claim was established. He relied on the judgment recovered by him against the corporation in Kansas. It is contended by the defendants that this judgment does not establish any debt due to the plaintiff. But we think that the objection is not sound. The judgment, as against the corporation and its privies, does establish the debt named therein as due to the plaintiff, but subject to a defeasance for such an amount as might be shown to have been paid to sub-contractors and laborers by the corporation. The defendants, as well as the corporation, were at liberty to show any credits which, by the stipulation, were properly applicable in reduction of the amount of the judgment. None such were shown, or attempted to be shown. Until such credits were shown the judgment stood valid for the whole amount. It was not for the plaintiff, but for the defendants, to show that any such credits existed.

The next and principal question is, whether J. & W. Seligman & Co., or J. & W. Seligman, were stockholders of the Memphis, Carthage, and Northwestern Railroad Company, within the meaning of the law. Did the sixty thousand shares of stock belong to them? or did they hold it by way of trust or as collateral security for the fulfilment of the company's obligations in relation to the bonds? The courts in England, and some in this country, have gone very far in sustaining a liability for unpaid subscriptions to stock against persons holding the same in any capacity whatever, whether as trustees, guar-

dians, or executors, or merely as collateral security. It cannot be denied that, in some cases, the extreme length to which the doctrine has been pushed has operated very harshly; and in cases in which the corporation itself has no just right to enforce payment, and where no bad faith or fraudulent intent has intervened, it may be doubted whether creditors have any better right, unless by force or some express provision of a statute. The Missouri statute recognizes the justice of making a discrimination between those who hold stock in their own right, and those who hold it merely in a representative capacity, or as trustees, or by way of collateral security.

Upon a careful examination of the facts found in this case we do not see how a reasonable doubt can exist, that the Seligmans held the stock in question as trustees and custodians by way of collateral security for themselves and the purchasers of the bonds. That was clearly the intent of the parties, declared in almost so many words; and that intent must prevail unless, by some inadvertency in carrying it out, the Seligmans have been unwittingly caught in some legal snare of which the creditors can take advantage. By the contract executed between them and the corporation they were to act as its financial agents in the disposal of its bonds, and to make advances of money from time to time to enable the company to get the necessary iron for completing its road and equipment for running it. The company were to prepare the superstructure and procure the ties and everything necessary by way of preparation for laying the iron down; and was to do this by means of the resources it had already secured, and expected to obtain, from the township subscriptions, in order that the mortgage to be given as security for the bonds might be good and valid for that purpose; and the company further agreed to *deposit* with Seligman & Co. a majority of its capital stock, to remain in their control for the term of one year at least. The reasonable inference is, that this deposit of stock was to be made for the purpose alleged in the defendant's answer, namely, as security for the payment of the bonds, and to enable Seligman & Co. to control the corporation and see that its affairs were honestly conducted and the earnings properly applied. The resolution of the directors, adopted for carrying out this agreement, is to

the same purport and effect: it directs that, in making negotiations for money with Seligman & Co., certificates for a majority of the capital stock should be issued to them to hold *in trust* for the period of twelve months; and when the stock was entered upon the transfer-book in the name of J. & W. Seligman, it was characterized as being "held in escrow."

The terms used may not have been strictly technical. The issuing of the stock in their names may not have been a "deposit" or an "escrow" in the strict sense of those words; but the intent is very clear, that the stock was not to be regarded as their stock, but as belonging to the company, though in their names, and that it was to be held by them simply as a security. They never subscribed for the stock, they never became indebted to the company for it, the company never acquired any right to demand from them a single dollar on account of it. Though issued in form, it was only issued in a qualified sense, to subserve a specific purpose by way of collateral security for a limited period, and was returnable to the company when that purpose should be accomplished. It seems to us that the Seligmans, in taking and holding the stock, held it merely in trust by way of collateral security for themselves and others, and that they were therefore within the express exception made by the law in favor of those holding stock in that way.

It is urged, however, that they are estopped from claiming the benefit of this exemption by their conduct in being represented and voting at stockholders' meetings. But if the law allows stock to be held in trust, or as collateral security, without personal liability; and if, as we suppose, the clear effect of the contract was to create such a holding in this case, — we do not see how the doctrine of estoppel can apply. The only parties to complain would be the other stockholders, who might, perhaps, complain that stock held merely in trust, or as collateral security, is not entitled to participate with them in the privilege of voting. But from them no complaint is heard. Creditors could not complain, for, on the hypothesis that stock may lawfully be held at all in trust, or as collateral security, without incurring liability to them, the act of voting on the stock cannot injure or affect them. In the absence of such a law the case might be very different. Undoubtedly it has

been held in cases innumerable, that acting as a stockholder binds one as such; but that is where the law does not allow stock to be held at all without incurring all the liabilities incident to such holding. The present is an action at law based upon the supposed liability of the defendants under a statute which makes the distinction referred to, and which does not make all stockholders liable indiscriminately. We think that this makes a material difference. If the defendants can show, as we think they have shown, that they are within the exception of the statute, the statutory liability does not apply to them.

It is by no means clear, however, that J. & W. Seligman did not have a right to vote on the stock, even as against the stockholders. When the law provides that if a person holds stock as a trustee, or by way of collateral security only, he shall not be personally liable for the company's debts, it supposes that the stock shall be holden, and that the pledgee or trustee shall be the holder. If, then, the law is to have any force or effect, the mere fact of holding cannot be set up as a bar or estoppel against proof of the manner and character of such holding. And if such pledgee or trustee may be a holder of the stock in that character, is he bound to be perfectly passive in his holding? He will not be entitled to any dividends or profits, it is true; or, if he receives dividends or profits, he must account therefor; but is it certain that he may not lawfully vote on the stock? An executor, administrator, guardian, or trustee certainly may vote; and where is the rule to be found that a holder for collateral security, under a law which permits such holding, may not vote on the stock so held without losing his character as a mere pledgee? But, as before said, if the pledgee in voting the stock exceeds his rights as such pledgee, it cannot have the effect of making the stock his own. No one is injured, and no one can complain except the other stockholders whose rights are invaded.

The line of authorities usually quoted to show that those who actually hold stock, and who manifest a voluntary or intentional holding by voting on it, or receiving dividends or other benefit from it, consists mainly of cases in which parties have been held as corporators or associates as between themselves

and the corporation or joint-stock association, and as such incidentally liable to the creditors of such companies. Sir Nathaniel Lindley, in his able treatise on Partnership, has amply discussed the whole subject upon the platform of the English decisions. His fundamental proposition is this: "The type, then, of a member or shareholder of a company is a person who has agreed to become a member, and with respect to whom all conditions precedent to the acquisition of the rights of a member have been duly observed. . . . In practice, difficulties are only presented where this standard is not reached; and the important question really is to what extent it can be departed from, and membership be nevertheless constituted." Vol. i. p. 128. He then devotes many pages to show, by adjudged cases, how a man may be held as a corporator by the company itself, by holding himself out as such, as by taking dividends, &c. Now, in the present case the relation of J. & W. Seligman & Co. to the corporation is expressly settled and fixed by the written contract between them. We have already examined that contract, and have shown that the stock issued by the corporation to J. & W. Seligman & Co. was issued to them only as trustees and by way of collateral security. The proposition that the corporation could hold them as subscribers to its stock would be in flat defiance of the contract in whole and in every part. We do not know of any iron rule of law which would prevent them from showing this contract relation between them and the company. It is the origin and foundation of their whole connection with it. The sufficiency of the evidence to control their *status* towards the company is another thing. Its competency seems to us free from doubt. When examined it shows, as before stated, that as between them and the company the latter has no claim whatever against them in relation to the stock except to have it returned when properly required, after the purpose of its issue had been accomplished. It belongs to the company, and to it alone. J. & W. Seligman are mere trustees or custodians of it for a special purpose, that purpose being collateral security.

In this connection we may properly refer to the decision of the Court of Appeals of Maryland in the case of *Matthews* v. *Albert*, 24 Md. 527, which was a case arising upon the

Maryland statute from which that of Missouri was copied so far as relates to the exception of those holding stock in trust or as collateral security. That was a suit in equity brought against stockholders to render them liable for the company's debts. One of them, by the name of Tieman, had loaned money to the corporation, and, as security for its payment, a certificate of stock had been issued to him. After its issue an indorsement was made on it by the president of the corporation to the effect that it had been deposited with Tieman as collateral security for the loan. The court said: —

"The claim of W. H. Tieman is for $2,000, money alleged to be loaned to the company on the 8th of January, 1859. But it is insisted by the appellees, that Tieman, instead of being a non-stockholding creditor, is, according to the evidence, a stockholder, and as much liable as the Alberts. We do not concur in this view of the relation of Tieman to the company. In our opinion, his claim is for money loaned; and the stock transferred to him was held by him as collateral security for his loan, and so holding it, he is not personally subject to any liability as stockholder, but is protected by the provision of the twelfth section of the act of 1852, c. 338."

A similar decision in a case arising upon a like statute in New York was made by the Commissioners of Appeal of that State in *McMahon* v. *Macy*, 51 N. Y. 155. The New York railroad act of 1850, as amended by the act of 1854, made stockholders liable to creditors of the company for the amount unpaid on their stock; but the eleventh section of the act contained precisely the same provision as that in the ninth section of the Missouri law, that no person holding stock as executor, administrator, guardian, or trustee, and no person holding stock as collateral security, should be personally subject to any liability as stockholders, imposing the liability, however, as the Missouri law does, on the pledgor or *cestui que trust*. Macy was sued as a stockholder, and it was shown on the trial that the stock held by him was transferred to him as collateral security. The referee refused to give any effect to this evidence, holding that parol evidence could not be received to contradict or vary the written assignments or transfers, which were absolute in form. The Commissioners of Appeal, on this

branch of the case, said: "In this he erred. It is always competent to show that an assignment or conveyance absolute in form was only intended as a security. There is nothing in any statute which makes the books of the company incontrovertible evidence of ownership of stock. A person may be the absolute legal and equitable owner of stock without any transfer appearing upon the books." All the judges of the commission concurred in this opinion.

We do not well see how any different conclusion could logically have been arrived at. If the law declares that stock held as collateral security shall not make the holder liable, surely it must be competent to show that it is so held. And when this fact is once established, there is an end of the application of estoppel, unless it can be invoked by some party who has been specially misled by the conduct of the defendants.

It is urged by the plaintiff, in this case, that the defendants are estopped as to him, because of a certain conversation between Joseph Seligman and himself before he entered into the contract for construction. We have carefully examined the account given of this conversation by the plaintiff himself, and we see nothing in it which at all compromits the defendants on the question of their actual *status* and position in the affairs of the company. Especially may this be said in view of the fact that, prior to that conversation, an attorney, who had inspected the contract of Seligmans & Co., told him of it, and that it would be well for him to have a talk with Joseph Seligman before entering into contract with the railroad company for its construction. The general purport of the conversation which he afterwards had with Seligman was, that Seligman advised him to take the contract and go on with the work, as the best thing for all parties, as there would be ample means to get hold of the local bonds, which would be sufficient to grade the road. Surely there was nothing in this conversation to estop the defendants from showing what their real position was with regard to the stock which they held.

But the appellant's counsel, with much confidence, press upon our attention the decisions of the Supreme Court of Missouri on the questions involved in this case, and on the very transactions which we are considering. That court, since the

determination of this case by the Circuit Court, has given judgment in two cases adversely to the judgment in this, and to the views above expressed. The first case was that of *Griswold* v. *Seligman*, decided in November, 1880; the other, that of *Fisher* v. *Seligman*, decided in February, 1882, in which the former case was substantially followed and confirmed. The case of *Griswold* v. *Seligman* seems to have been very fully and carefully considered. We have read the opinion of the court and the dissenting opinion of one of the judges with much attention, but we are unable to come to the conclusion reached by the majority.

We do not consider ourselves bound to follow the decision of the State court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the State tribunals contrary to that given by the Circuit Court. The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the

State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the State courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions. The principal cases bearing upon the subject are referred to in the note, but it is not deemed necessary to discuss them in detail.[1]

[1] *McKeen* v. *Delancy's Lessee*, 5 Cranch, 22; *Polk's Lessee* v. *Wendal*, 9 id. 87; *Thatcher* v. *Powell*, 6 Wheat. 119; *Preston's Heirs* v. *Bowmar*, id. 580; *Daly's Lessee* v. *James*, 8 id. 495; *Elmendorf* v. *Taylor*, 10 id. 152; *Shelby* v. *Guy*, 11 id. 361; *Jackson* v. *Chew*, 12 id. 153–168; *Fullerton* v. *Bank of United States*, 1 Pet. 604; *Gardner* v. *Collins*, 2 id. 58; *United States* v. *Morrison*, 4 id. 124; *Green* v. *Neal's Lessee*, 6 id. 291; *Groves* v. *Slaughter*, 15 id. 449; *Swift* v. *Tyson*, 16 id. 1; *Carpenter* v. *Providence Washington Insurance Co.*, id. 495; *Carroll* v. *Safford*, 3 How. 441; *Lane* v. *Vick*, id. 464; *Rowan* v. *Runnels*, 5 id. 134; *Smith* v. *Kernochen*, 7 id. 198; *Nesmith* v. *Sheldon*, id. 812; *Williamson* v. *Berry*, 8 id. 495; *Van Rensselaer* v. *Kearney*, 11 id. 297; *Webster* v. *Cooper*, 14 id. 488; *Ohio Life Insurance & Trust Co.* v. *Debolt*, 16 id. 416; *Beauregard* v. *New Orleans*, 18 id. 497; *Watson* v. *Tarpley*, id. 517; *Pease* v. *Peck*, id. 595; *Morgan* v. *Curtenius*, 20 id. 1; *League* v. *Egery*, 24 id 264; *Suydam* v. *Williamson*, id. 427; s. c. 6 Wall. 786; *Leffingwell* v. *Warren*, 2 Black, 599; *Mercer County* v. *Hacket*, 1 Wall. 83; *Gelpcke* v. *City of Dubuque*, id. 175; *Seybert* v. *Pittsburg*, id. 272; *Havemeyer* v. *Iowa County*, 3 id. 294; *Thomson* v. *Lee County*, id. 327; *Christy* v. *Pridgeon*, 4 id. 196; *Mitchell* v. *Burlington*, id. 270; *Lee County* v. *Rogers*, 7 id. 181; *Butz* v. *City of Muscatine*, 8 id. 575; *The City* v.

In the present case, as already observed, when the transactions in question took place, and when the decision of the Circuit Court was rendered, not only was there no settled construction of the statute on the point under consideration, but the Missouri cases referred to arose upon the identical transactions which the Circuit Court was called upon, and which we are now called upon, to consider. It can hardly be contended that the Federal court was to wait for the State courts to decide the merits of the controversy and then simply register their decision; or that the judgment of the Circuit Court should be reversed merely because the State court has since adopted a different view. If we could see fair and reasonable ground to acquiesce in that view, we should gladly do so; but in the exercise of that independent judgment which it is our duty to apply to the case, we are forced to a different conclusion. *Pease* v. *Peck*, 18 How. 595, and *Morgan* v. *Curtenius*, 20 id. 1, in which the opinions of the court were delivered by Mr. Justice Grier, are precisely in point.

The cardinal position assumed by the State court is, that inasmuch as certificates of stock were in fact issued to, and accepted by, J. & W. Seligman, and they voted on the stock, they are absolutely estopped from denying that they are the owners of the stock, subject to all the liabilities incident to that relation; and that they cannot have the benefit of the exception accorded by the law to those who hold stock as collateral security, because, as the court holds, that exemption only applies to those who have received stock in that way from some stockholder who can be made liable as a stockholder, and not to those who have received stock from the corporation itself by way of collateral security.

The first position, that the acceptance of the stock, and voting upon it, absolutely precluded the defendants from denying that they are owners of the stock, has been already considered.

Lamson, 9 id. 477; *Olcott* v. *The Supervisors*, 16 id. 678; *Supervisors* v. *United States*, 18 id. 71; *Boyce* v. *Tabb*, id. 546; *Township of Pine Grove* v. *Talcott*, 19 id. 666; *Elmwood* v. *Marcy*, 92 U. S. 289; *State Railroad Tax Cases*, id. 575; *Ober* v. *Gallagher*, 93 id. 199; *Town of South Ottawa* v. *Perkins*, 94 id. 260; *Davie* v. *Briggs*, 97 id. 628; *Fairfield* v. *County of Gallatin*, 100 id. 47; *Oates* v. *National Bank*, id. 239; *Douglass* v. *County of Pike*, 101 id. 677; *Barrett* v. *Holmes*, 102 id. 651; *Thompson* v. *Perrine*, 103 id. 806; s. c. 106 id. 589.

The great mass of authorities relied on by the Supreme Court of Missouri, on this part of the case, English as well as American, are cases in which parties have been held as corporators or associates as between themselves and the corporation, and upon that footing have been held responsible to creditors when the rights of creditors have been in question. We think that we have sufficiently shown that these authorities cannot govern the case in hand if any effect is to be given to the law of Missouri, exempting from personal liability those who hold stock in a fiduciary character or by way of collateral security. We will, therefore, briefly examine the other position, that this law does not apply to those who receive stock as collateral security from the corporation itself.

The argument that the exemption from liability in cases of stock held as collateral security, applies only to those who have received it from third persons who were stockholders and who can be proceeded against as such, seems to us unsound, and contrary both to the words and the reason of the law. It takes for granted that stock cannot be received as collateral security from the corporation itself and still belong to the corporation, and yet we know that such transactions are very common in the business of this country. The words of the statute are positive, and relate to all holders of stock for collateral security. They are as follows: "No person holding stock in any such company as executor, administrator, guardian, or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such company." The reason of this law is derived from the gross injustice of making a person liable as the owner of stock when he only holds it in trust or by way of security, and from the inexpediency of putting a clog upon this species of property, which will have the effect of making it unavailable to the owner, or of deterring prudent and responsible men from accepting positions of trust where any such property is concerned. It seems to us that not only the law, but the reason upon which it is founded, applies to the holders of stock as collateral security, whether received from an individual or from the corporation itself. It is argued, however, that the remaining words of the law are repugnant to this view. These words are as follows: "But

the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly, and the estates and funds in the hands of such executor, administrator, guardian, or trustee shall be liable, in like manner and to the same extent, as the testator or intestate, or the ward or person interested in such fund, would have been if he had been living and competent to act, and held the stock in his own name." The argument is, that these words imply that there must always be some person or estate to respond for the stock, or else the exemption cannot take effect. The obvious answer is, that this clause fixes the liability upon the pledgor as a stockholder, where there is a pledgor who can be made liable in that character. When the corporation pledges its own stock as collateral security, though it cannot be proceeded against as a stockholder *eo nomine*, the reason is because it is primarily liable, before all stockholders, for all its debts. In such a case the clause last quoted would not strictly apply to it; but the holder of its stock as collateral security would be within both the letter and the spirit of the first clause. It is supposed that some flagrant injustice would ensue if there was not some one who could be reached as a stockholder in every case of stock pledged as collateral security; hence, stock pledged by the corporation itself must be regarded as belonging to the pledgee, though no other pledgee of stock is treated in this way. Where is the justice of this? Why should the stock be necessarily considered as belonging to some one besides the corporation itself? Is any one harmed by considering the corporation as its true owner? If the stock had not been issued as collateral security, it would not have been issued at all; it would not have been in existence. Would the creditors have been any better off in such case? They are better off by the issue of the stock as collateral, because the general assets of the company have received the benefit of the moneys obtained by means of the pledge. The more closely the matter is examined, the more unreasonable it seems to deny to a pledgee of the corporation the same exemption which is extended to the pledgee of third persons. We think that the one equally with the other is protected by the express words and true spirit of the law.

We might pursue the subject further, and examine in detail the suggestions and authorities adduced by the learned court which decided the case of *Griswold* v. *Seligman* and *Fisher* v. *Seligman*; but it is unnecessary. What we have said is sufficient to indicate substantially the grounds on which we feel obliged to dissent from its conclusions. In our judgment the facts found by the court below make out a clear case of stock held in trust and by way of collateral security only, and the judgment rendered thereon was correct.

Judgment affirmed.

TURNER v. MARYLAND.

1. Section 41 of chapter 346 of the laws of Maryland of 1864, as amended and re-enacted by chapter 291 of the laws of 1870, provides as follows: "After the passage of this act, it shall not be lawful to carry out of this State, in hogsheads, any tobacco raised in this State, except in hogsheads which shall have been inspected, passed, and marked agreeably to the provisions of this act, unless such tobacco shall have been inspected and passed before this act goes into operation; and any person violating the provisions of this section shall forfeit and pay the sum of three hundred dollars, which may be recovered in any court of law of this State, and which shall go to the credit of the tobacco fund: *Provided*, that nothing herein contained shall be construed to prohibit any grower of tobacco, or any purchaser thereof, who may pack the same in the county or neighborhood where grown, from exporting or carrying out of this State any such tobacco without having the same opened for inspection; but such tobacco so exported or carried out of this State without inspection shall in all cases be marked with the name in full of the owner thereof, and the place of residence of such owner, and shall be liable to the same charge of outage and storage as in other cases, and any person who shall carry or send out of this State any such tobacco, without having it so marked, shall be subject to the penalty prescribed by this section." Under that proviso, no requirement of the act of 1864 is dispensed with, except that of having the hogshead opened for inspection. The hogshead must still be delivered at a State tobacco warehouse, and there numbered and recorded and weighed and marked, and be found to be of the dimensions prescribed by statute, and to have been packed and marked as required. *Held*, 1. That said section 41, as so amended and re-enacted, is not, in its provisions as to charges for outage and storage, in violation of clause 2 of section 10 of article 1 of the Constitution of the United States, as respects any impost or duty imposed by it on exports, or of the clause of section 8 of article 1 which gives power to the Congress "to regulate commerce with foreign nations and among the several States;" nor is it a regu-

lation of commerce or unconstitutional, as discriminating between the State buyer and manufacturer of leaf tobacco and the purchaser who buys for the purpose of transporting the tobacco to another State or to a foreign country, or as discriminating between different classes of exporters of tobacco. 2. That the charge for outage, thereby made, is an inspection duty, within the meaning of the Constitution, and it is not foreign to the character of an inspection law to require every hogshead of tobacco to be brought to a State tobacco warehouse. 3. That dispensing with an opening for inspection of the hogsheads mentioned in the proviso does not, in view of the other provisions of the tobacco inspection statutes of the State, deprive those statutes of the character of inspection laws.

2. The characteristics of inspection laws considered, with references to the legislation of the American colonies and the States on the subject.
3. *Quære*, Is it not exclusively the province of Congress to determine whether a charge or duty, under an inspection law, is or is not excessive.
4. The charge for outage in this case appears to be a charge for services properly rendered.

ERROR to the Court of Appeals of the State of Maryland.

The case is stated in the opinion of the court.

Mr. John K. Cowen and *Mr. Eben J. D. Cross* for the plaintiff in error.

Mr. Charles J. M. Gwinn, Attorney-General of Maryland, *contra.*

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

The question presented for our consideration on this writ of error is the constitutional validity of certain provisions in the tobacco inspection statutes of the State of Maryland.

The plaintiff in error, Turner, was indicted in the Criminal Court of Baltimore. The indictment contained two counts. The first count alleged that Turner packed in a hogshead tobacco grown by him on a farm belonging to him in Charles County, in Maryland, and marked the hogshead with his full name and his place of residence in said county, and shipped it to the city of Baltimore; that it was not delivered at any tobacco warehouse in said city, under the management or control of any inspector of tobacco appointed for said warehouse by the governor of the State of Maryland, under the Constitution and laws of said State, nor to any one of said inspectors of tobacco, nor to any one acting under the authority of any one of said inspectors of tobacco, to be weighed, passed, or marked, and it was not weighed, passed, and marked by any such in-

spector of tobacco, nor by any person acting under the authority of any one of said inspectors of tobacco; but that the said Turner exported it from said city to Bremen, in Germany, without having procured it to be weighed, passed, and marked by any such inspector of tobacco, or by any person acting under the authority of any one of said inspectors of tobacco. The second count contained the same allegations, and the further averment that the said Turner did not, prior to said exportation, pay or cause to be paid any sum of money due for outage, or any sum of money due for storage, to the State of Maryland, on said hogshead, to any such inspector of tobacco, or to any other person having authority to receive the same, although certain sums of money were due and payable by him to said State for outage and storage on said hogshead.

Separate demurrers were filed to each count of the indictment, and then a written stipulation was filed by the parties, as follows: "It is agreed in this case, 1. That the matters and facts charged in the indictment in this case are true, as therein stated. 2. That for the more speedy final determination of the questions of law involved in this case the demurrers which the traverser has entered to this indictment shall be overruled *pro forma* by the court. 3. That after such overruling of the demurrers the case shall be forthwith submitted to the court, without the intervention of a jury, upon the admission contained in the first paragraph of this agreement." The demurrers were then overruled. The court then rendered a judgment that Turner pay a fine of $300. On the same day, Turner, by petition to said criminal court, setting forth that he had been adjudged guilty of a misdemeanor, and by the judgment of said court ordered to pay the sum of $300 to said State, prayed an appeal to the Court of Appeals of Maryland, assigning errors in the record. That court affirmed the judgment, and Turner has brought the case into this court by a writ of error, alleging that the statutes of Maryland on which the indictment was founded, and the validity of which was sustained by the State court, are repugnant to the Constitution of the United States.

It is claimed by the defendant in error that the statutory provisions the validity of which is denied by the plaintiff in

error are "inspection laws," within the meaning of clause 2 of section 10 of article 1 of the Constitution of the United States, which clause is as follows: "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net proceeds of all duties and imposts laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

By chapter 346 of the laws of Maryland of 1864, a new tobacco inspection law was enacted, as part of the code of public local laws, in place of and expressly repealing certain portions of said code. Sect. 1 provides for the appointment of five tobacco inspectors, one for each State tobacco warehouse in the city of Baltimore. By sect. 5 each tobacco inspector is required to employ such clerks and laborers, and provide and keep on hand such books, implements, and materials, as may be necessary for the economical and effective discharge of his duties as such inspector, and the salaries of the various clerks and laborers are prescribed, to be paid from the receipts in the respective offices, with the requirement that the inspectors shall at no time employ more labor than shall be necessary for the effective performance of the work to be done. There are provisions to facilitate the landing of tobacco at the wharves in front of the warehouses, and its removal therefrom, and to secure the safe preservation of the tobacco after its delivery at the warehouse. Sect. 10 is as follows: "It shall be the duty of each tobacco inspector to cause each hogshead of tobacco landed or delivered at the warehouse to which he is appointed to be numbered in succession as received, and to cause said number to be entered in a book kept for that purpose, together with the time said hogshead was received, the name of the vessel or other conveyance, if known to him, by which said hogshead was brought to the city of Baltimore, and of the owner or consignee of said tobacco, and the initials or other marks on said hogshead, identifying the same; and, when said hogshead shall be removed from said warehouse, he shall cause an entry to be made, in some book kept for that purpose, of the time when the same was so removed, the name of the per-

son to whom the same was delivered, and of the vessel or other conveyance by which the same was taken away." It is provided by sect. 12 that each inspector shall cause all the tobacco in the warehouse to which he may have been appointed to be inspected as speedily as practicable, in regular order, as numbered; and by sect. 13 that he shall cause each hogshead of tobacco, before it is uncased, to be weighed, and the tobacco in each hogshead and the cask itself to be separately weighed, and the weight of each hogshead, as first weighed, and the gross and net weight of the tobacco therein contained, after inspection, to be entered in a proper book, with sufficient reference to its marks and numbers as previously recorded; and by sect. 14 that he shall mark on the side of each hogshead, with a marking-iron, its warehouse number and weight, and the net weight of tobacco contained therein, and its warehouse number on each head, with blacking; and, by succeeding sections, that he shall uncase and break all tobacco, in whatever State raised, and draw samples from each hogshead, and tie each lot of samples together, and label it with the warehouse number of the hogshead, and the number of the warehouse, and the date of inspection, and the name of its owner, or, if known, the initials or other marks on the hogshead, and deliver it sealed, if the tobacco be merchantable, to the owner, with a certificate stating the date of inspection, the warehouse mark and number of the hogshead, the weight thereof, and the net weight of the tobacco in it, and that unmerchantable tobacco shall be reconditioned, packed, reweighed, and reinspected, and then sampled and certified; and by sect. 27 that every hogshead shall be liable to the charge of $1.50 outage, if weighing less than 1,100 pounds, and to 15 cents additional for every 100 pounds, which shall be paid by the purchaser thereof to the inspector, before it is removed. Penalties are imposed by sect. 40 for erasing, altering, or adding to any mark placed by the inspector on any hogshead or any label of any sample, and for fraudulently taking any tobacco from a sample, or substituting other tobacco for any in such sample, and for counterfeiting any inspector's certificate or seal. Sect. 41 is as follows: "After the passage of this act, it shall not be lawful to carry out of this State, in hogsheads, any tobacco raised in this State,

except in hogsheads which shall have been inspected, passed, and marked agreeably to the provisions of this act, unless such tobacco shall have been inspected and passed before this act goes into operation; and any person violating the provisions of this section shall forfeit and pay the sum of three hundred dollars, which may be recovered in any court of law of this State, and which shall go to the credit of the tobacco fund." This section was amended by chapter 291 of the laws of 1870, by re-enacting it with the following addition: "*Provided*, that nothing herein contained shall be construed to prohibit any grower of tobacco, or any purchaser thereof, who may pack the same in the county or neighborhood where grown, from exporting or carrying out of this State any such tobacco without having the same opened for inspection; but such tobacco so exported or carried out of this State without inspection shall in all cases be marked with the name in full of the owner thereof, and the place of residence of such owner, and shall be liable to the same charge of outage and storage as in other cases, and any person who shall carry or send out of this State any such tobacco, without having it so marked, shall be subject to the penalty prescribed by this section." Sect. 42 prescribes the size of the casks in which tobacco raised in Maryland shall be packed, and forbids the inspector to inspect or pass it until packed in a hogshead of proper dimensions.

By chapter 36 of the laws of 1872, entitled "An Act to add a new article to the code of public general laws regulating the inspection of tobacco," some additional regulations were made, and some existing provisions were re-enacted, and some changes were made, and all inconsistent provisions of law were repealed; but the only material additions or changes made, so far as the present case is concerned, were these: By sect. 11, every inspector shall have uncased and break every hogshead of tobacco delivered for inspection, in so many places for Maryland and Ohio, and in so many places for Kentucky and Virginia, and, if the tobacco is sound, take a sample, and mark the hogshead with its number, the year of inspection, and the initials of the owner on each head and on the bilge, and the tare and net weight on the bilge. By sect. 15, each inspector shall keep in a book "the name of the owner, the number, gross, tare, and

net weight of every hogshead of tobacco inspected by him, the State where grown, the consignee of the same, the name of the vessel by which shipped out, and the name of the party shipping the same, and for every hogshead so inspected by him he shall issue his certificate or note, stating in such certificate or note the name or initials of the owner, the number of the hogshead, the State where grown, the date of inspection, and the gross, tare, and net weight of the hogshead, and he shall make no delivery of inspected tobacco from his warehouse except upon surrender of the certificate or note corresponding with the number of the hogshead." By sect. 26, "no tobacco of the growth of this State shall be passed or accounted lawful tobacco unless the same be packed in hogsheads not exceeding fifty-four inches in length of the staves, nor exceeding forty-six inches across the head, and the owner, or his agent, of tobacco packed in any hogshead of greater dimensions shall repack the same in hogsheads of the size herein prescribed, at his own expense, before the same shall be passed."

By chapter 228 of the laws of 1872, the charge for outage is fixed at $2 for every hogshead not exceeding 1,100 pounds, and 12½ cents additional on every 100 pounds over 1,100 pounds, to be paid by the shipper of the tobacco, or his agent.

In order to determine whether the statutory provisions in question are obnoxious to the objection made, their meaning must be ascertained. The act of 1864 requires the inspector to examine the hogshead to ascertain whether it is of the required dimensions, and then to inspect the tobacco itself by sampling the contents, and, when this has been done, and the weight ascertained, the hogshead is passed. In regard to the addition made by the act of 1870, c. 291, to sect. 41 of the act of 1864, the grower or purchaser of tobacco packed in the county or neighborhood where it is grown is permitted to export the same without having the hogshead opened for inspection by sampling its contents; but the act requires such hogshead to be marked with the name and residence of the owner, and it is made liable to the charge of outage as in other cases, and any one violating its provisions is subjected to the penalty imposed by sect. 41 of the act of 1864. The act of 1870, in thus permitting the grower or purchaser of tobacco

packed in the county or neighborhood where it is grown to export the same without having the hogshead opened for inspection, does not dispense with any other requirement of the act of 1864 in regard to inspection. It provides, in express terms, that each hogshead thus packed shall be marked with the name and residence of the owner. It is necessary, therefore, that some one shall ascertain whether these requirements have been complied with, and whether the tobacco was, in fact, the growth of the county or neighborhood where it was packed. It also requires that such tobacco shall be liable to the same charge of outage as in other cases, and, as the charge of outage depends upon the weight of the hogshead, it is necessary that some one shall ascertain the weight of such hogshead, in order to determine the amount to be paid. It does not change or in any manner dispense with the statutory requirements in regard to the dimensions of the hogshead in which such tobacco is to be packed, and it is necessary that some one shall see that these requirements are complied with. These and other duties, it is obvious, are to be performed by the inspectors, and when they are performed the hogshead is to be passed and marked as provided by the act of 1864. When the words "such tobacco so exported or carried out of this State without inspection" are read in connection with the preceding sentence, which permits the grower or purchaser to export such tobacco "without having the same opened for inspection," it is clear that the term "without inspection" refers to inspection by opening the hogshead and sampling the contents.

The act of 1872, c. 36, changes some of the provisions of the act of 1864, omits others, and in express terms repeals all acts or parts of acts inconsistent with its provisions. The penal clause of the act of 1864, as amended by the act of 1870, which makes it unlawful to carry out of the State in hogsheads tobacco raised in the State, except in hogsheads inspected, passed, and marked according to the provisions of the act, is omitted in the act of 1872; but there is nothing, either in the title or the general framework of the act, or in the manner in which the subject-matter is dealt with, to justify the conclusion that the legislature intended the act of 1872 as a substitute for all prior legislation on the subject. The provisions of such prior

laws are essential to give completeness to the system of which the act of 1872 is but a part. That does not, it is true, make it unlawful to export tobacco raised in the State unless the same shall have been inspected and passed, but it does provide that no tobacco, the growth of the State, shall be passed or accounted lawful tobacco unless the same be packed in hogsheads of certain prescribed dimensions. It does not say, in so many words, that the tobacco raised in the State and intended for exportation shall be delivered at one of the State tobacco warehouses, but it does provide for the appointment of inspectors of tobacco, clerks and other officials, with fixed salaries, and assigns them to the tobacco warehouses, with no duty to perform unless it be the inspection of tobacco. In thus declaring that no tobacco, the growth of the State, shall be accounted lawful tobacco unless packed in the manner prescribed by the act, it is plain the legislature meant it to be the duty of the inspectors appointed by the act to ascertain whether such tobacco was thus packed in conformity with the requirements of the statute, and this they could not do unless such tobacco should be delivered at the State tobacco warehouses. The legislature meant, and only meant, to select certain provisions from the public local law in relation to the inspection of tobacco, and to re-enact these in a public general law, and to leave such portion of the local law which it did not thus re-enact and did not modify or repeal by inconsistent provisions, as existing parts of the local law. The act of 1872 did not modify or repeal sect. 41 of the act of 1864, as modified by the act of 1870, which constituted part of the local law; and under that section it was the duty of the plaintiff in error to have delivered the tobacco packed by him at one of the State tobacco warehouses, in order that the inspectors might ascertain whether it was packed in hogsheads of the proper dimensions, and whether it was packed in the county or neighborhood where it was grown, and marked as the statute directed. The legislature did not intend that merely marking the name of the grower or purchaser on the hogshead should release such grower or purchaser from the other requirements of the act. These views are those which were held by the Court of Appeals of Maryland in its opinion delivered in this

case. 55 Md. 240. The result is, that all that the act of 1870 does in regard to a grower or purchaser of tobacco raised in Maryland, who packs the same in hogsheads in the county or neighborhood where such tobacco is grown, and who exports it or carries it out of the State, is to dispense with the opening of such hogsheads for inspection, but that it does not dispense with any other requirement of the act of 1864 in regard to inspection; and that it is a part of such inspection for the inspector to see that the hogshead is marked with the name and place of residence of the owner, and to verify the claimed fact that the tobacco was raised in Maryland and packed in the county or neighborhood where it was grown, and to weigh the hogshead in order to determine the charge for outage, and to see that the hogshead conforms in dimensions to the requirement of the statute, so that the tobacco may be passed and accounted lawful tobacco. It is also apparent, that not until the above and other duties have been performed by the inspectors can the hogshead be passed and marked as required by the act of 1864. This requires, in regard to the hogsheads specially mentioned in the proviso enacted in 1870 to sect. 41 of the act of 1864, that they be delivered at one of the State tobacco warehouses, and that the provisions of sect. 10 of the act of 1864 be observed, that is, that the inspector shall number each hogshead in succession, and enter the number in a book, with the time the hogshead is received, and the name, if known, of the conveyance by which it was brought to Baltimore, and the name of the owner or consignee of the tobacco, and the initials or other marks on the hogshead identifying it, and, on its removal, enter in a book the time of removal, and the name of the person to whom it is delivered, and of the conveyance by which it is taken away; that, under sect. 12 of the act of 1864, it shall be inspected in all required particulars except opening it; that, under sect. 13 of that act, the inspector shall weigh the hogshead unopened and enter such weight in a book, with sufficient reference to its marks and numbers as previously recorded; that, under sect. 14 of that act, the inspector shall mark with a marking-iron, on the side of each hogshead, its warehouse number and weight, and on each head its warehouse number; and that not until these things have

been done is the tobacco to be passed or accounted as lawful tobacco.

The plaintiff in error contends that sect. 41 of the act of 1864, as re-enacted by the act of 1870, violates the Constitution of the United States, because: 1. It is a regulation of inter-state and foreign commerce, and a law levying a duty on exports, and does not fall within the class of laws known as inspection laws, because the proviso enacts that the tobacco to which it refers need not be opened for inspection. 2. Said section, even though it is an inspection statute, discriminates against the non-resident buyer and manufacturer of leaf tobacco, and in favor of the State buyer and manufacturer, in imposing burdensome regulations on tobacco intended for export, and laying a tax of at least two dollars a hogshead on such tobacco when exported, while tobacco manufactured within the State is free from such regulations and such tax, and thus it discriminates against inter-state and foreign commerce in tobacco, and in favor of local manufacturers and the internal trade of the State. 3. Said section discriminates between different classes of exporters of tobacco, in that it permits tobacco exported by persons who pack it in the county or neighborhood where it is grown, to be exported when marked with the full name and residence of the owner, without inspection other than the examination of the outsides of the hogsheads, while exporters of another class must have the contents of their hogsheads subjected to examination.

The provisions of the Constitution of the United States alleged to be violated are clause 2 of section 10 of article 1, before quoted, and that clause of section 8 of article 1 which provides that the Congress shall have power "to regulate commerce with foreign nations and among the several States."

The Maryland court held that the charge of outage in this case was an inspection duty, within the meaning of the Constitution; that the State had the power to prescribe the dimensions of the hogshead in which tobacco raised in Maryland shall be packed, and to require such hogshead to be delivered at one of the State tobacco warehouses, in order that the inspectors may ascertain whether it conforms to the requirements of the law, and whether it is the true growth of the State and

packed by the grower or purchaser in the county or neighborhood where it was grown; and that the charge of outage, to reimburse the State for the expenses thereby incurred, and in consideration of the storage of the hogshead, is in the nature of an inspection duty, within the meaning of the Constitution.

The contention of the plaintiff in error is, that a law which otherwise would be an inspection law ceases to be such if no provision is made for opening the package containing the article and examining the quality of its contents. On this subject the Maryland court held, that, in order to constitute an inspection law, an examination of the quality of the article itself is not necessary; but that to prepare the products of a State for exportation it may be necessary that such products should be put in packages of a certain form, and of certain prescribed dimensions, either on account of the nature and character of such products, or to enable the State to identify the products of its own growth, and to furnish the evidence of such identification in the markets to which they are exported. In opposition to these views, which appear to us to be sound, we are asked to hold that the provisions under consideration do not fall under the head of inspection laws, in a case where the question is presented without the finding of any facts to show that what *may* be thus necessary in regard to a product is not necessary in regard to tobacco, and with every presumption to the contrary arising out of the course of legislation as to the inspection of tobacco, by the State of Maryland. The legislature of the State of Maryland, from the earliest history of the colony and since the formation of the State government, has made the inspection of tobacco raised in that State compulsory. That inspection has included many features, and has extended to the form, size, and weight of the packages containing the tobacco, as well as to the quality of the article. Fixing the identity and weight of tobacco alleged to have been grown in the State, and thus preserving the reputation of the article in markets outside of the State, is a legitimate part of inspection laws, and the means prescribed therefor in the statutes in question naturally conduce to that end. Such provisions, as parts of inspection laws, are as proper as provisions for inspecting quality; and it cannot be said that the absence of the latter

provisions, in respect to any particular class of tobacco, necessarily causes the laws containing the former provisions to cease to be inspection laws. It is easy to see that the use of the precaution of weighing and marking the weight on the hogshead and recording it in a book is to enable it to be determined at any time whether the contents have been diminished subsequently to the original packing, by comparing a new weight with the original marked weight, or, if the marked weight be altered, with the weight entered in the warehouse book. The things required to be done in respect to the hogshead of tobacco in the present case, aside from any inspection of quality, are to be done to prepare and fit the hogshead, as a unit, containing the tobacco, for exportation, and for becoming an article of foreign commerce or commerce among the States, and are to be done before it becomes such an article. They are properly parts of inspection laws, within the definition given by this court in *Gibbons* v. *Ogden*, 9 Wheat. 1. In a note to the argument of Mr. Emmet in that case, at page 119, are collected references to many statutes of the States, in the form of inspection laws, showing what features have been generally recognized as falling within the domain of those laws, — such as the size of barrels or casks, and the number of hoops on them; what pieces of beef or pork, and what quantity and size of nails, should be in one cask; the length, breadth, and thickness of staves and heading, lumber, boards, shingles, &c.; and the branding of pot and pearl ashes, flour, fish, and lumber, and the forfeiture of them, if unbranded. These were cited as instances of the exercise by States of the power to act upon an article grown or produced in a State, before it became an article of foreign or domestic commerce, or of commerce among the States, to prepare it for such purpose. It was in reference to laws of this character that it was said, in argument, in *Gibbons* v. *Ogden*, that the enactments seemed arbitrary, and were not founded on the idea that the things the exportation of which was thus prohibited or restrained were dangerous or noxious, but had for their object to improve foreign trade and raise the character and reputation of the articles in a foreign market. It was in reference to such laws, among other inspection laws, that Chief Justice Marshall, in *Gibbons*

v. *Ogden*, p. 203, after remarking that a power to regulate commerce was not the source from which a right to pass inspection laws was derived, said: "The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves." It was not suggested by the court that those particular laws were not valid exercises of the power of the State to fit the articles for exportation, or that in addition to, or even aside from, ascertaining the quality of the article produced in a State, the State could not define the form of the lawful package or its weight, and subject form and weight, with or without quality, to the supervision of an inspector, to ascertain that the required conditions in respect to the article were observed.

In addition to the instances cited in *Gibbons* v. *Ogden*, the diligence of the attorney-general of the State of Maryland has collected and presented to us, in argument, numerous instances,[1]

[1] The following are the acts, and the subjects in reference to which they were passed: — *New Hampshire:* Casks of flaxseed, 1785. See Perpetual Laws of New Hampshire, 1789, p. 193. Dimensions of shingles, staves, and hoops. Id., p. 188. *Massachusetts:* Shingles, staves, and hoops. Acts and Resolves of the Province of Mass. Bay, vol. iii. [1742–1756], p. 128 *et seq.*, c. 22. Size of casks for pickled fish. Id., p. 1000, act of 1757. *Rhode Island:* Regulating the inspection of beef, pork, pickled fish, and tobacco, and ascertaining the assize of casks, clapboards, shingles, boards, &c. Public Laws of Rhode Island and Providence Plantations, ed. 1798, pp. 509, 512, 522. *Connecticut:* Statutes of Conn., ed. 1786. For ascertaining the assize of casks used for liquor, beef, pork, and fish, pp. 18, 312. There were sworn packers of tobacco, whose duty it was to brand casks. *New York:* Laws, ed. 1789. All flour for exportation to be packed in casks of a certain size and make. No flour to be exported without having been inspected. 1785, c. 35, p. 197. No pot or pearl ashes to be exported before inspection. *New Jersey:* Capacity of meat barrels. Act of April 6, 1676. Leaming and Spicer, p. 116. Capacity of barrels, id., p. 120; bricks, id., p. 459; barrels, id. 508. Assize of bread, id. 545, 546, 547. Size of casks. Act of 1725. Staves, hoops, shingles, &c. Act of Sept. 26, 1772. Size of casks. Act of Sept. 26, 1772. *Pennsylvania:* Laws of Penn., A. J. Dallas, 1797. Dimensions of casks for beer, ale, pork, beef, &c. Id., p. 27 *et seq.* Dimensions of staves, headings, boards, and

showing, by the text of the inspection laws of the thirteen American colonies and States, in force in 1787, when the Constitution of the United States was adopted, that the form, capacity, dimensions, and weight of packages were objects of inspection irrespective of the quality of the contents of the packages. The instances embrace, among others, the dimensions of shingles, staves, and hoops; the size of casks and barrels for fish, pork, beef, pitch, tar, and turpentine; and the size of hogsheads of tobacco. In Maryland, the dimensions of tobacco hogsheads were fixed by various statutes passed from the year 1658 to the year 1763. By the act of 1763, c. 18, sect. 18, it was enacted that all tobacco packed in hogsheads exceeding forty-eight inches in the length of the stave, and seventy inches in the whole diameters within the staves, at the croze and bulge, should be accounted unlawful tobacco and should not be passed or received. Like provisions fixing the dimensions of hogsheads of tobacco have been in force in Maryland from 1789 till now. In view of such legislation existing at the time the Constitution of the United States was adopted and ratified by the original States, known to the framers of the Constitution who came from the various States, and

timber. Id., p. 380. Flour casks, how to be made, and dimensions of. Id., p. 452, Act of 1781, c. 201. *Maryland:* Gauge of barrels for pork, beef, pitch, tar, turpentine, and tare of barrels for flour or bread, 1745, c. 15. Flour barrels, 1771, c. 20; 1781, c. 12. Staves and headings, 1745, c. 15; 1771, c. 20; 1786, c. 17. Salted provisions, 1745, c. 15; 1786, c. 17. Hay and straw, 1771, c. 20. Flour, 1781, c. 12. Fish, 1786, c. 17. Liquor casks, 1774, c. 23; 1777, c. 17; 1784, c. 83; 1785, c. 87. Many other Maryland provincial laws, prescribing the length, superficial and solid measure, weight and capacity, of domestic products, are collected on pages 45–47 of the report of Mr. J. H. Alexander on the Standards of Weight and Measurement in Maryland. *Virginia:* Laws of Va. Revisal, 1783, pp. 47, 188, 192. Pork, &c., required to be packed in barrels, before exportation. As to contents, quality, and stamps of barrels of pork, beef, pitch, tar, and turpentine, see id., p. 47, act of 1776, c. 43. Inspection of tobacco, and size of tobacco hogsheads. Act of 1783, c. 10, sects. 1, 15, 20. *North Carolina:* Iredell's Laws of N. C., ed. 1791. Dimensions of beef, pork, and fish casks, staves, and headings, and of boards, planks, and shingles. Act of 1784, c. 36. *South Carolina:* Grimke's Public Laws. Dimensions and capacity of beef and pork barrels, p. 209. *Georgia:* Watkins's Digest. Casks for beef and pork. Size of barrels for pitch, tar, and turpentine. Act of 1766, No. 140, amended by act of 1768, No. 179. In the legislation of the Province and State of Maryland, in reference to tobacco, the *dimensions*, or *gauge*, of *tobacco hogsheads* was fixed by the acts of 1658, c. 2; 1676, c. 9; 1694, c. 5; 1699, c. 4; 1704, c. 53; 1711, c. 5; 1715, c. 38; 1716, c. 8; 1717, c. 7; 1723, c. 25; 1747, c. 26; 1753, c. 22; 1763, c. 18; and 1789, c. 26.

called "inspection laws" in those States, it follows that the Constitution, in speaking of "inspection laws," included such laws, and intended to reserve to the States the power of continuing to pass such laws, even though to carry them out, and make them effective, in preventing the exportation from the State of the various commodities, unless the provisions of the laws were observed, it became necessary to impose charges which amounted to duties or imposts on exports to an extent absolutely necessary to execute such laws. The general sense in which the power of the States in this respect has been understood since the adoption of the Constitution is shown by the legislation of the States since that time, as collected in like manner by the attorney-general of Maryland,[1] covering the

[1] *Pennsylvania:* Beef and pork intended for exportation, when packed or repacked, in Philadelphia: 1 Brightly's Purdon's Digest, 1878, pp. 157, 158; butter and lard, id. 188, 189; domestic distilled spirits, id. 525; flaxseed, id. 708; flour and meal, id. 711; *Delaware:* Size of casks for exportation of breadstuffs. Revised Statutes, 1874, p. 363. *Virginia:* Tobacco, Code, 1873, pp. 739, 740; fish, id. 750; pitch, tar, turpentine, salt, staves, shingles, and lumber, id. 751. *Rhode Island:* Public Statutes, 1882; beef and pork casks, c. 3, p. 294; lime casks, id. 298; fish casks, id., c. 114, p. 299. *Maine:* Revised Statutes, 1871; lime, c. 39, sect. 3; pot and pearl ashes, id., sect. 9; nails, id., sect. 17; fish, id., c. 40, sects. 7, 8, and 11; cord-wood, id., c. 41, sect. 1; charcoal baskets, id., sect. 7; packed shingles, id., sect. 16; staves and hoops, id., sects. 18 and 19; beef and pork barrels, id., c. 38, sects. 16 and 17. *New Hampshire:* General Laws, 1878. No salted beef to be exported except in tierces, barrels, or half-barrels of particular quality, weight, and dimensions, and duly branded; c. 126, sects. 4 and 5; butter and lard casks, c. 127, p. 305; fish barrels, tierces, and casks, c. 129, p. 310; casks of pot and pearl ashes, c. 130, p. 114. *Massachusetts:* General Statutes, 1860; casks for pickled fish, c. 49, sect. 44; alewives, id., sect. 50; staves, id., sect. 85; hogshead hoops, id., sect. 86; casks for pot and pearl ashes, id., sect. 167; kegs for butter and lard, id., sect. 14. *Connecticut:* General Statutes, 1875; fish barrels, p. 275, sect. 19. *Vermont:* Revised Laws of 1880, p. 715; barrels of flour, weight, &c. *New Jersey:* Revision, 1877; beef and pork barrels, flour and meal casks, id. 437; herring casks, id. 478. *Georgia:* Code, 1867; flour barrels, sect. 1562; turpentine barrels, id., sect. 1573. *Louisiana:* Digest of Statutes, vol. ii. 1870; beef and pork barrels, p. 38, sect. 28. *Wisconsin:* Statutes of; fish casks, p. 856, sect. 22. *Michigan:* Compiled Laws, 1871, vol. i. pp. 474–485; size and weight of beef, pork, and fish barrels; butter and lard barrels; flour and meal casks; pot and pearl ash casks. *South Carolina:* General Statutes; flour barrels, p. 275; beef barrels, id. 279; staves and shingles, id. 280. *North Carolina:* Battle's Revisal; flour barrels, c. 61, sect. 34, p. 496; beef or pork casks, id., sect. 50, p. 499; fish barrels, id., sect. 53, p. 499; turpentine, tar, and pitch barrels, id., sect. 54, p. 500. *Tennessee:* Statutes, 1871; butter or lard casks, sect. 1832; flour barrels, sect. 1834. *Florida:* Digest of Laws, 1881, p. 579; sizes of tar and turpentine barrels.

form, capacity, dimensions, and weight of packages containing articles grown or produced in a State, and intended for exportation. These laws are none the less inspection laws because, as was said by this court in *Gibbons* v. *Ogden*, they "may have a remote and considerable influence on commerce." It is a circumstance of weight that the laws referred to in the Constitution are by it made "subject to the revision and control of the Congress." Congress may, therefore, interpose, if at any time any statute, under the guise of an inspection law, goes beyond the limit prescribed by the Constitution, in imposing duties or imposts on imports or exports. These and kindred laws of Maryland have been in force for a long term of years, and there has been no such interposition.

Objection is made that the Maryland laws are not inspection

Mississippi: flour and pork barrels; Rev. Code, 1880, sect. 949, p. 280. *Ohio:* Revised Statutes, 1880, vol. i.; hogsheads of tobacco, p. 264, sect. 391; fish barrels, id., sect. 4300; spirit barrels, sect. 4327; oil barrels, sect. 4293; pot and pearl ash barrels, sect. 4291; beef or pork barrels, sect. 4285; flour and meal barrels, sect. 4281.

The legislation of Maryland, since 1787, affords the following instances: Pot and pearl ashes, intended for exportation from Baltimore, or Georgetown, in Montgomery County, were required to be packed in a particular manner in casks, and to be inspected and weighed. 1792, c. 65. A similar provision was made to prevent the exportation of unmerchantable flour and unsound salted provisions from Havre de Grace, by the act of 1796, c. 21; and from Chester, by the act of 1797, c. 7. By the act of 1781, c. 12, provision was made to prevent the exportation of bread and flour which were not merchantable, from the town of Havre de Grace. This act was enacted for a limited time only, and expired. It was revived and enacted into a permanent law by the act of 1801, c. 102, sect. 2, and is set forth in a note to the section last referred to, in the acts of 1801. By sect. 6 of the act of 1801, c. 102, the size of all flour casks brought to Baltimore Town for exportation, the character of the materials and make, the manner of hooping and nailing such hoops, the particular length of the staves, the diameter of the casks at the heads, and the number of pounds of flour to be in each cask, are specifically prescribed. The size of laths, and the mode of packing them, was regulated by the act of 1811, c. 69. The number and character of hoops upon casks of ground black-oak bark, exported from the port of Baltimore, was prescribed by the act of 1821, c. 77. The gross weight of a hogshead of tobacco, as well as its net weight, was required to be marked on the hogshead by the act of 1789, c. 26, sect. 21. The dimensions of the hogsheads in which tobacco was required to be packed was prescribed by sect. 35 of the act last cited. Further illustration may be found in the following legislation: Weighing wheat, 1858, c. 256, sect. 5; *Frazier* v. *Warfield*, 13 Md. 300–304; fish barrels and tierces, Public Local Laws, art. 4, sect. 309; flour, id., sect. 352; domestic distilled liquors, id., sect. 360; flour barrels, 1 Md. Code, art. 96, sect. 20.

laws, but are regulations of commerce, because they require every hogshead of tobacco to be brought to a State tobacco warehouse. But we are of opinion that, it being lawful to require the article to be subjected to the prescribed examination by a public officer before it can be accounted a lawful subject of commerce, it is not foreign to the character of an inspection law to require that the article shall be brought to the officer instead of sending the officer to the article. It is a matter as to which the State has a reasonable discretion, and we are unable to see that such discretion has been exercised in any such manner as to carry the statutes beyond the scope of inspection laws.

There is another view of the subject which has great force. Recognized elements of inspection laws have always been quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds, all these matters being supervised by a public officer having authority to pass or not pass the article as lawful merchandise, as it did or did not answer the prescribed requirements. It has never been regarded as necessary, and it is manifestly not necessary, that all of these elements should coexist in order to make a valid inspection law. Quality alone may be the subject of inspection, without other requirement, or the inspection may be made to extend to all of the above matters. When all are prescribed, and then inspection as to quality is dropped out, leaving the rest in force, it cannot be said to be a necessary legal conclusion that the law has ceased to be an inspection law.

As is suggested in *Neilson* v. *Garza*, 2 Woods, 287, by Mr. Justice Bradley, it may be doubtful whether it is not exclusively the province of Congress, and not at all that of a court, to decide whether a charge or duty, under an inspection law, is or is not excessive. There is nothing in the record from which it can be inferred that the State of Maryland intended to make its tobacco-inspection laws a mere cover for laying revenue duties upon exports. The case is not like that of *Jackson Mining Co.* v. *Auditor-General*, 32 Mich. 488, where a State tax imposed on mineral ore exported from the State before being smelted was held to be a tax on inter-state commerce, no such

tax being imposed on like ore reduced within the State. The question of the right of Maryland, under the Constitution of the United States, to require that the dimensions and gross weight of a hogshead containing tobacco grown upon its soil shall be ascertained by its officers before the tobacco shall be exported, is a question of law, because the question is as to whether such law is an inspection law. Moreover, the question as to whether the charges for such examination and its attendant duties are "absolutely necessary," was not before the State court, and was not passed upon by it, and cannot be considered by this court.

It is urged, however, that the Maryland law is a regulation of commerce and unconstitutional, because it discriminates between the State buyer and manufacturer of leaf tobacco and the purchaser who buys for the purpose of transporting the tobacco to another State or to a foreign country. But the State, having the right to prescribe the form, dimensions, and capacity of the packages in which its products shall be encased before they are brought to, or sold in, the public market, has enacted that no tobacco of the growth of the State shall be passed or accounted lawful tobacco unless it be packed in hogsheads of a specified size. Laws of 1872, c. 36, sect. 26. This regulation covers all tobacco grown in the State and packed in hogsheads, without reference to the purpose for which it is packed. If the tobacco is to be dealt in within the limits of the State, the examination as to dimensions is properly left to the contracting parties, probably under the view that the seller for the home market will have a sufficient stimulus to observe the requirement of the law, in a desire to maintain the reputation of his commodity. But, if the tobacco is to be exported as lawful tobacco, the State may, with equal propriety, prescribe and enforce an examination by an officer, within the State, of a hogshead containing tobacco grown in the State, and intended for shipment beyond the limits of the State, in order to ascertain, before the hogshead is carried out of the State, and before it becomes an article of commerce, that it is of the dimensions prescribed as necessary to make it lawful tobacco. In *Cooley* v. *The Board of Wardens*, 12 How. 299, a law of Pennsylvania provided that a vessel not taking a pilot

should pay half pilotage, but that this should not apply to American vessels engaged in the Pennsylvania coal trade. It was held that the general regulation as to half pilotage was proper, and that the exemption was a fair exercise of legislative discretion acting upon the subject of the regulation of the pilotage of the port of Philadelphia. The court said that, in making pilotage regulations, the legislative discretion had been constantly exercised, in this and other countries, in making discriminations, founded on differences both in the character of the trade and in the tonnage of vessels engaged therein. Any discrimination appearing in the present case is of the same character as that in the pilotage case, and fairly within the discretion of the State. Such discretion reasonably extends to exempting from opening for internal inspection an article grown in the State, when it is marked with the name of an ascertained owner, and to requiring that an article grown in the State shall be opened for internal inspection when it is not intended to be put on the market on the credit of an ascertained owner, and is not identified by marks as owned by him. So, too, in the exercise of the same discretion, and of its power to prescribe the method in which its products shall be fitted for exportation, it may direct that a certain product, while it remains "in the bosom of the country" and before it has become an article "of foreign commerce or of commerce between the States," shall be encased in such a package as appears best fitted to secure the safety of the package and to identify its contents as the growth of the State, and may direct that the weight of the package, and the name of the owner of its contents, shall be plainly marked on the package, and may also exempt the contents from inspection as to quality, when the weight of the package and the name of the owner are duly ascertained to be marked thereon. Such a law is an inspection law, and may be executed by imposing a "tax or duty of inspection," which tax, so far as it acts upon articles for exportation, is an exception to the prohibition on the States against laying duties on exports, the exception being made because the tax would otherwise be within the prohibition. *Brown* v. *State of Maryland*, 12 Wheat. 419, 438. At the same time we fully recognize the principle, that any inspection law is subject

to the paramount right of Congress to regulate commerce with foreign nations and among the several States.

The general provision of the Maryland statute is, that it shall not be lawful to carry out of the State, in hogsheads, any tobacco raised in the State, except in hogsheads which shall have been inspected, passed, and marked agreeably to the provisions of the act. These provisions include the doing of many things in addition to an inspection of quality. If the tobacco is grown in the State, and packed in the county or neighborhood where grown, it may be carried out of the State without having its quality inspected, if it be marked in the manner prescribed. But it still is necessary it should be inspected in all other particulars, and inspected also to ascertain that it was grown in the State and packed where grown, and is marked as required. If it does not answer the latter requirements it is to be further inspected as to quality. The necessity thus existing for subjecting the hogshead to inspection under all circumstances, a charge of some kind was proper for outage, that is, a charge payable, on withdrawing the hogshead, for labor connected with receiving and handling it and doing the other things above mentioned. Such charge appears to be a charge for services properly rendered.

The above views cover the objection made that the Maryland law discriminates between different classes of exporters of tobacco, and favors the person who packs it for exportation in the county or neighborhood where it is grown, as against other exporters. Whatever discrimination in this respect or in respect of purchases for exportation, before referred to, results from any provisions of the law, is a discrimination which, we think, the State has a right to make, resulting, as it does, wholly from regulations which affect the article before it has become an article of commerce, and which attach to it as and when it is grown, and before it is packed or sold. The tobacco is grown with these regulations in force, and the State has a right to say what shall be lawful merchantable tobacco. This is really all that has been done in regard to the tobacco in question.

In this case no inspection is involved except that of tobacco grown in Maryland, and we must not be understood as express-

ing any opinion as to any provisions of the Maryland laws which refer to the inspection of tobacco grown out of Maryland.

Judgment affirmed.

PEOPLE v. COMPAGNIE GÉNÉRALE TRANSATLANTIQUE.

1. The statute of New York of May 31, 1881, imposing a tax on every alien passenger who shall come by vessel from a foreign country to the port of New York, and holding the vessel liable for the tax, is a regulation of foreign commerce, and void. *Henderson* v. *Mayor of New York*, 92 U. S. 259, and *Chy Lung* v. *Freeman*, id. 275, cited, and the rulings therein made reaffirmed.
2. The statute is not relieved from this constitutional objection by declaring in its title that it is to raise money for the execution of the inspection laws of the State, which authorize passengers to be inspected in order to determine who are criminals, paupers, lunatics, orphans, or infirm persons, without means or capacity to support themselves and subject to become a public charge, as such facts are not to be ascertained by inspection alone.
3. The words "inspection laws," "imports," and "exports," as used in cl. 2, sect. 10, art. 1, of the Constitution, have exclusive reference to property.
4. This is apparent from the language of cl. 1, sect. 9, of the same article, where, in regard to the admission of persons of the African race, the word "migration" is applied to free persons, and "importation" to slaves.

ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is fully stated in the opinion of the court.

Mr. William M. Evarts, *Mr. George N. Sanders*, and *Mr. Lewis Sanders* for the plaintiff in error.

Mr. Frederick R. Coudert for the defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

This was an action commenced by the People of the State of New York, in the Court of Common Pleas for the City and County of New York, to recover of the defendant the sum of one dollar for each alien passenger brought into New York by its vessels, for whom a tax had not before been paid, with penalties and interest. The case was removed into the Circuit Court of the United States, which, on demurrer to the complaint, rendered a judgment in favor of the defendant. The plaintiff then brought this writ of error.

The tax in this case is demanded under sect. 1 of a statute of New York, passed May 31, 1881, entitled "An Act to raise money for the execution of the inspection laws of the State of New York." The section reads thus: —

"SECT. 1. There shall be levied and collected a duty of one dollar for each and every alien passenger who shall come by vessel from a foreign port to the port of New York for whom a tax has not heretofore been paid, the same to be paid to the chamberlain of the city of New York by the master, owner, agent, or consignee of every such vessel within twenty-four hours after the entry thereof into the port of New York."

It has been so repeatedly decided by this court that such a tax as this is a regulation of commerce with foreign nations, confided by the Constitution to the exclusive control of Congress, and this court has so recently considered the whole subject in regard to similar statutes of the States of New York, Louisiana, and California, that unless we are prepared to reverse our decisions and the principles on which they are based, in the cases of *Henderson* v. *Mayor of New York* and *Chy Lung* v. *Freeman*, 92 U. S. 259, 275, there is little to say beyond affirming the judgment of the Circuit Court, which was based on those decisions.

The argument mainly relied on in the present case is that the new statute of New York, passed after her former statutes had been declared void in *Passenger Cases*, 7 How. 283, and in the recent case of *Henderson* v. *Mayor of New York*, is in aid of the inspection laws of the State. This argument is supposed to derive support from another statute passed three days earlier, entitled "An Act for the inspection of alien emigrants and their effects by the commissioners of emigration."

This act empowers and directs the commissioners of emigration "to inspect the persons and effects of all persons arriving by vessel at the port of New York from any foreign country, as far as may be necessary, to ascertain who among them are habitual criminals, or pauper lunatics, idiots, or imbeciles, or deaf, dumb, blind, infirm, or orphan persons, without means or capacity to support themselves and subject to become a public charge, and whether their persons or effects are affected with

any infectious or contagious disease, and whether their effects contain any criminal implements or contrivances."

Subsequent sections direct how such characters, if found, shall be dealt with by the board. Other sections of the act of May 31 direct the chamberlain of the city to pay over to the commissioners of emigration all such sums of money as may be necessary for the execution of the inspection laws of the State of New York, and the net produce of all duties received by him under that act, after the necessary payments to the commissioners of emigration, to the treasury of the United States.

These two statutes, construed together, it is argued, are inspection laws within the meaning of art. 1, sect. 10, cl. 2, of the Constitution of the United States, to wit: "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of the Congress."

What laws may be properly classed as inspection laws under this provision of the Constitution must be determined largely by the nature of the inspection laws of the States at the time the Constitution was framed.

In the opinion of this court in the case of *Turner* v. *Maryland*, delivered by Mr. Justice Blatchford contemporaneously with the one in the present case, there is an elaborate examination of those statutes, many of which are cited, *ante*, pp. 51–54. Similar citations are found in a foot-note to the report of *Gibbons* v. *Ogden*, 9 Wheat. 1, 119.

We feel quite safe in saying that neither at the time of the formation of the Constitution nor since has any inspection law included anything but personal property as a subject of its operation. Nor has it ever been held that the words "imports and exports" are used in that instrument as applicable to free human beings by any competent judicial authority.

We know of nothing which can be exported from one country or imported into another that is not in some sense property,

—property in regard to which some one is owner, and is either the importer or the exporter.

This cannot apply to a free man. Of him it is never said he imports himself, or his wife or his children.

The language of sect. 9, art. 1, of the Constitution, which is relied on by counsel, does not establish a different construction: "The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person."

There has never been any doubt that this clause had exclusive reference to persons of the African race. The two words "migration" and "importation" refer to the different conditions of this race as regards freedom and slavery. When the free black man came here, he migrated; when the slave came, he was imported. The latter was property, and was imported by his owner as other property, and a duty could be imposed on him as an import. We conclude that free human beings are not imports or exports, within the meaning of the Constitution.

In addition to what is said above, it is apparent that the object of these New York enactments goes far beyond any correct view of the purpose of an inspection law. The commissioners are "to inspect all persons arriving from any foreign country to ascertain who among them are habitual criminals, or pauper lunatics, idiots, or imbeciles, . . . or orphan persons, without means or capacity to support themselves and subject to become a public charge."

It may safely be said that these are matters incapable of being satisfactorily ascertained by inspection.

What is an inspection? Something which can be accomplished by looking at or weighing or measuring the thing to be inspected, or applying to it at once some crucial test. When testimony or evidence is to be taken and examined, it is not inspection in any sense whatever.

Another section provides for the custody, the support, and the treatment for disease of these persons, and the retransportation of criminals. Are these inspection laws? Is the ascertainment of the guilt of a crime to be made by inspection?

In fact, these statutes differ from those heretofore held void only in calling them in their caption "inspection laws," and in providing for payment of any surplus, after the support of paupers, criminals, and diseased persons, into the treasury of the United States, — a surplus which, in this enlarged view of what are the expenses of an inspection law, it is safe to say will never exist.

A State cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease, and to cure the sick, an inspection law, within the constitutional meaning of that word, by calling it so in the title.

Since the decision of this case in the Circuit Court, Congress has undertaken to do what this court has repeatedly said it alone had the power to do. By the act of Aug. 8, 1882, c. 376, entitled "An Act to regulate immigration," a duty of fifty cents is to be collected, for every passenger not a citizen of the United States who shall come to any port within the United States by steam or sail vessel from a foreign country, from the master of said vessel by the collector of customs. The money so collected is to be paid into the treasury of the United States, and to constitute a fund to be called the immigrant fund, for the care of immigrants arriving in the United States, and the relief of such as are in distress. The Secretary of the Treasury is charged with the duty of executing the provisions of the act and with supervision over the business of immigration. No more of the fund so raised is to be expended in any port than is collected there. This legislation covers the same ground as the New York statute, and they cannot coexist.

Judgment affirmed.

UNITED STATES v. TELLER.

By a special act, B. was allowed a pension of fifty dollars per month, which was paid to him until he claimed and received, under a subsequent general act, seventy-two dollars per month. *Held*, that he is not entitled to take under both acts.

ERROR to the Supreme Court of the District of Columbia.

Section 4 of the act of March 3, 1873, c. 234, entitled "An Act to revise, consolidate, and amend the pension laws," provides that from and after June 4, 1872, all persons entitled by law to a less pension than thereinafter specified, who, while in the military or naval service of the United States, and in the line of duty, have been so permanently and totally disabled as to render them utterly helpless, or so nearly so as to require the regular personal attendance of another person, shall be entitled to a pension of thirty-one dollars and twenty-five cents per month.

The act of June 18, 1874, c. 298, granted a pension of fifty dollars per month to the persons described in the act of March 3, 1873, in lieu of the pension of thirty-one dollars and twenty-five cents granted by that act.

The act of June 16, 1880, c. 236, provides as follows: "All soldiers and sailors . . . who are now receiving the pension of fifty dollars per month," under the act last aforesaid, "shall receive, in lieu of all pensions now paid them by the government of the United States, and there shall be paid to them, in the same manner as pensions are now paid to such persons, the sum of seventy-two dollars per month." It further declares "that all pensioners whose pensions shall be increased by the provisions of this act, from fifty dollars per month to seventy-two dollars per month, shall be paid the difference between said sums monthly, from June 17, 1878, to the time of the taking effect of this act."

Prior to the passage of the last-mentioned act Congress had passed the act of March 3, 1879, c. 290, entitled "An Act granting an increase of pension to Ward B. Burnett." It is as follows: "That the Secretary of the Interior be, and he is hereby, authorized and directed to place on the pension-roll the name of Ward B. Burnett, and pay him a pension of fifty

dollars per month in lieu of the pension he now receives; but nothing in this act contained shall entitle the said Ward B. Burnett to arrears of pension."

On Oct. 20, 1882, Ward B. Burnett, the person named in the act last mentioned, filed, as relator, in the name of the United States, a petition in the Supreme Court of the District of Columbia against Henry M. Teller, Secretary of the Department of the Interior, in which he recited the foregoing legislation of Congress, and averred that he was a survivor of the war with Mexico, and other wars, in which he was an officer in the army of the United States; that he was wounded at the battle of Cherubusco on Aug. 24, 1847; that for wounds received in battle he was paid, under the general laws, a pension at the rate of thirty dollars per month, which he received from Aug. 1, 1848, until March 3, 1879; that under the special act of the date last mentioned a pension certificate, dated June 6, 1879, signed by the Secretary of the Interior and countersigned by the Commissioner of Pensions, was executed and delivered to him, on which he was paid from March 3, 1879, to June 4, 1882, a pension at the rate of fifty dollars per month.

The petition further alleged that the relator had applied to the Commissioner of Pensions to be paid the increased rates of pension authorized by the said acts of Congress, approved respectively March 3, 1873, June 18, 1874, and June 16, 1880, and had received another pension certificate, dated July 17, 1882, which recited that the relator was entitled to a pension at the rate of thirty dollars per month, to commence on Aug. 1, 1848, and of thirty-one and one-fourth dollars per month from June 4, 1872, and of fifty dollars per month from June 4, 1874, and seventy-two dollars per month from June 17, 1878; that on July 21, 1882, the relator returned to the Secretary of the Interior the pension certificate which had been issued to him under the special act of Congress passed March 3, 1869, granting him a pension of fifty dollars per month; that when he returned said certificate he was without the advice of counsel, and was fearful that he would be deprived of his greater pension under the general pension laws; and that, on Oct. 4, 1882, relator respectfully demanded in writing of the Secretary of the Interior that he return to him said certificate, which the

Secretary, by his decision made Oct. 18, 1882, refused to do. The petition prayed for the writ of *mandamus* to compel the Secretary to return said certificate to the relator, and to cause to be paid to him the accrued pension due thereon.

The Secretary of the Interior filed an answer to this petition, in which he alleged that since June 4, 1872, the relator had received under the general pension laws payments as follows: From June 4, 1872, to June 4, 1874, the sum of $750, being at the rate of $31.25 per month; from June 4, 1874, to June 17, 1878, the sum of $2,421.66, being at the rate of $50 per month; from June 17, 1878, to June 4, 1882, the sum of $3,424.80, being at the rate of $72 per month; from June 4, 1882, to Sept. 4, 1882, at the same rate, $216, — making in all the sum of $6,812.46; and that, in addition to the payments under those laws, he had received, under the special act of March 3, 1879, granting him by name a pension at the rate of fifty dollars per month, payments as follows: from March 3, 1879, to June 4, 1882, the sum of $1,951.67, being at the rate of $50 per month.

The answer further alleged that on July 21, 1882, the relator addressed a letter of that date to the Secretary of the Interior, with which he returned the certificate dated June 17, 1882, issued to him under the special act of March 3, 1879, granting him a pension of fifty dollars per month. That letter was as follows: —

"WASHINGTON, July 21st, 1882.

"Hon. H. M. TELLER, *Secretary of the Interior.*

"SIR, — To relieve your department from further embarrassment in reference to what has been styled Gen. Ward B. Burnett's claim of double pension, I hereby return to you my certificate, and relinquish any claim that I may have under it from date of this letter, made under a special act of Congress (increase), dated March 3d, 1879, upon which I have been drawing fifty dollars per month, and shall be satisfied with receiving my pension under the general pension laws, granted by yourself, under the several opinions of the Attorney-General, dated July 17, 1882, until Congress, in its bounty, shall think proper to increase my pension of seventy-two dollars per month under said general pension laws again.

"I have the honor to be, very respectfully, yours,

"WARD B. BURNETT."

The case having, by stipulation of parties, been heard in the first instance at the general term of the Supreme Court of the District, a judgment was rendered dismissing the petition. This writ of error is prosecuted to review that judgment.

Mr. James H. Mandeville for the plaintiff in error.
The Solicitor-General, contra.

MR. JUSTICE WOODS delivered the opinion of the court, and, after stating the case as above, proceeded as follows: —

The relator does not claim that there is anything due him under the pension laws prior to June 4, 1872. It appears from the answer of the Secretary of the Interior, and there is no evidence to the contrary, that since June 4, 1872, the relator has received every cent that is due him under the general pension laws. The special act of March 3, 1879, c. 290, declared that the pension of fifty dollars thereby granted to him by name should be in lieu of the pension he was then receiving, and at least cut off all claim to arrears of pensions under it. All, therefore, that is left of his case is his contention that in addition to that pension he is entitled to seventy-two dollars per month allowed him by the act of June 16, 1880, c. 236, and which has been paid him.

It appears from the answer of the Secretary of the Interior that under the advice of the Department of Justice the relator was paid both pensions from March 3, 1879, to June 4, 1882. The complaint of the relator is that the payment of double pensions is not continued, and it is for the purpose of enforcing his right to his special pension of fifty dollars, in addition to the general pension of seventy-two dollars, that he asks that the Secretary of the Interior may be compelled to return the certificate issued to him under the special act.

The right of the relator to double pensions, if he ever had such right, has been effectually cut off by sect. 5 of the act of July 25, 1882, c. 349, which declares "that no person who is now receiving or shall hereafter receive a pension under a special act shall be entitled to receive, in addition thereto, a pension under the general law, unless the special act expressly states that the pension granted thereby is in addition to the pension which said person is entitled to receive under the general law."

It was competent for Congress to pass this act. No pensioner has a vested legal right to his pension. Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall, at its discretion. *Walton* v. *Cotton*, 19 How. 355. Therefore, the contention of the relator that, having received the pension of seventy-two dollars under the general law, he is also entitled to the pension of fifty dollars granted him by the special act, is without ground to rest on.

His pension certificate, issued under the special act, can be of no service to him unless he wishes to relinquish the pension of seventy-two dollars under the general law, and fall back upon the pension of fifty dollars granted him by the special act. But he expresses no such purpose. His object is to get the certificate in order to draw double pensions, which the law says he shall not have. He voluntarily surrendered his pension under the special act, in order to receive the larger pension to which he became entitled on the passage of the general act of June 16, 1880. As he is not entitled to any pension money upon the certificate under the special act, which he voluntarily surrendered, unless he waives his right to receive the larger pension given him by the general law, which he does not do, a judgment that the certificate be returned to him would be futile. From all that appears by the record the relator has been accorded by the officers of the Department of the Interior and of the Pension Bureau all his rights. Up to Sept. 4, 1882, he was paid all the pension money due him under any act of Congress. After that date he is entitled under existing laws to a pension of seventy-two dollars per month and no more, and this the Pension Bureau is ready to pay him. The Supreme Court of the District was, therefore, right in refusing the writ of *mandamus*, and its judgment must be

Affirmed.

CUSHING v. LAIRD.

FOSTER v. CUSHING.

1. When persons summoned as garnishees in a libel in admiralty *in personam* are adjudged by the court to have a fund of the principal defendant in their hands and to pay it into court, and the libellant afterwards obtains a final decree against him with an award of execution against the fund in their hands, the first order is interlocutory, and they can appeal from the last decree only.
2. A final decree of acquittal and restitution to the only claimant in a prize cause determines nothing as to the title in the property, beyond the question of prize or no prize; and another person, who actually conducts the defence in the prize cause in behalf and by consent of the claimant, without disclosing his own title under a previous bill of sale from the claimant, is not estopped to contest the claimant's title in a subsequent suit brought by creditors attaching the property or its proceeds as belonging to the claimant.

APPEALS from the Circuit Court of the United States for the Southern District of New York.

The facts are stated in the opinion of the court.

Mr. J. Langdon Ward and *Mr. Robert D. Benedict* for Cushing.

Mr. J. Hubley Ashton, *Mr. Cornelius Van Santvoord*, *Mr. A. J. Vanderpool*, and *Mr. James Thomson*, *contra*.

MR. JUSTICE GRAY delivered the opinion of the court.

This is a libel in admiralty, filed in the District Court for the Southern District of New York by John N. Cushing and others against John Laird, Jr., to recover damages for the destruction of the libellants' vessel, the "Sonora," by the "Alabama." The defendant was not found and never appeared in the cause, and his credits and effects were attached in the hands of Foster & Thomson, garnishees.

The garnishees answered that they had in their hands a fund amounting to $31,441.62, known as the proceeds of the steamer "Wren," which was the property of Charles K. Prioleau and not of Laird. Upon the trial of the issue raised by this answer, the District Court, in April, 1873, adjudged that the fund belonged to Laird, and ordered the garnishees to pay it into court. See 6 Benedict, 408. From that decree the gar-

nishees appealed to the Circuit Court. The District Court afterwards, in September, 1873, entered a decree in favor of the libellants against Laird for the sum of $143,298.70, and costs, "and that the libellants have execution thereon, to satisfy this decree, against the property of the said respondent, and especially against his property, credits, and effects in the hands of Foster & Thomson, garnishees." From this decree also the garnishees appealed to the Circuit Court.

The Circuit Court dismissed the first appeal, and retained the cause for hearing on the second appeal only; and, upon consideration, entered a decree by which it was adjudged that the fund in the hands of the garnishees was not the property of Laird, and could not be subjected to the payment of the decree against him, the attachments against the garnishees were discharged, and both decrees of the District Court, so far as affected them and the fund in their hands, were reversed with costs. See 15 Blatchf. 219.

The findings of fact by the Circuit Court are printed at length in 15 Blatchf. 220–236, and, so far as they are material to be stated, are as follows: —

The steamer "Wren" was built at Birkenhead, England, in 1864, by Laird Brothers, and was registered on the 24th of December, 1864, at Liverpool, in accordance with the laws of Great Britain, in the name of John Laird, Jr., as owner; a certificate of the registry was issued in due form; the vessel sailed from Liverpool, having the certificate on board as part of her ship's papers, and it did not appear that she ever again entered a British port. On the 3d of January, 1865, after she had left Liverpool, Laird executed to Charles K. Prioleau, of Liverpool, a member of the firm of Fraser, Trenholm, & Company, for the consideration of £15,450, a bill of sale of the vessel, which, on the 1st of May, 1865, was duly entered at the custom-house in Liverpool, and the vessel registered in the name of Prioleau as owner. On the 13th of June, 1865, on the high seas, on a voyage from Havana to Liverpool, by the way of Halifax, Nova Scotia, some of the crew took forcible possession of the vessel, overcame her officers, ran her into Key West, and there delivered her to the naval authorities of the United States.

On the 16th of June, 1865, the Attorney of the United

States for the Southern District of Florida filed in the District Court for that district an information against the vessel as prize of war. She was taken into the custody of the marshal, and a monition issued to all persons interested to appear on the 27th of June and show cause against a decree of condemnation. On the 26th of June Edward C. Stiles, master of the vessel, appeared in court and filed a claim, stating that he was the master, and, as such, the lawful bailee of the vessel, and claimed the same for the owner thereof; and that Laird, a British subject, residing in England, was the true and *bona fide* owner of the vessel, and that no other person was the owner thereof, as appeared by her register in the possession of the court, and as he was informed and believed; denying that she was a prize of war, and praying restitution and damages.

The only certificate of registry found on board was that granted on the 24th of December, 1864, upon which were noted, at the British Consulate in Havana, changes of masters on the 24th of March and the 10th of June, 1865, and at the foot of which was the following: "NOTE. A certificate of the registry granted under the Merchant Shipping Act, 1854, is not a document of title. It does not necessarily contain notice of all changes of ownership, and in no case does it contain an official record of any mortgage affecting the ship."

On the 17th, 19th, and 20th of June, 1865, the depositions of the master and other officers of the vessel were taken *in preparatorio;* and on the 27th of June the court proceeded to hear the case upon the allegations and pleadings, the depositions taken *in preparatorio*, and the papers, letters, and writings found on board the vessel. On the 29th of June the court, of its own motion, directed the prize commissioner to take immediately the testimony of the officers, and of any other witnesses who might be produced by the claimants from persons on board the vessel, upon specified interrogatories; of two persons named, and any others on board produced by the captors, upon some of the same interrogatories; and of any witnesses, produced either by the captors or the claimants from persons not on board, upon certain other interrogatories; and allowed two days to the parties to produce witnesses. Under this order testimony was taken; and on the 3d of July

the court resumed the hearing upon the allegations and pleadings, the depositions taken *in preparatorio*, the papers found on board, and the depositions taken under the order allowing further proof.

The court, on the 8th of July, announced its opinion, condemning the vessel, but, on account of exceptions taken to some rulings, delayed making a decree in form until the 15th of August, when it was duly entered, reciting that a claim had been interposed by the master in behalf of Laird, that the case had been heard as aforesaid, and that it appeared to the court that the "Wren" was, at the time of capture, the property of enemies of the United States; and adjudging her to be condemned and forfeited to the United States as lawful prize of war, and to be sold by the marshal, and the proceeds to be deposited with the Assistant Treasurer of the United States, subject to the order of the court. From that decree the claimant, on the same day, appealed to this court. The vessel was afterwards sold, and the proceeds of the sale deposited with the Assistant Treasurer.

Prioleau still resided in England, and it did not appear that he had any actual knowledge of the proceedings for condemnation until after the entry of the decree. He afterwards retained Foster & Thomson, the garnishees in this case, attorneys and counsellors at law in the city of New York, to do whatever might be necessary for the protection of his interests; and they procured a copy of the record of the District Court and had the appeal docketed in this court, and employed additional counsel, who argued the case here on the record sent up. No additional testimony was taken, and no change in the pleadings made or applied for. Upon the argument in this court, the counsel for the United States insisted that it appeared from the evidence that the vessel, at the time of the capture, was the public property of rebel enemies, and, in support of this position, referred to the testimony of witnesses who swore that Fraser, Trenholm, & Company were her owners. The counsel for the appellant insisted that there was not a particle of evidence that she was ever enemies' property, but that the evidence was conclusive that she was at all times the property of Laird, a British neutral.

This court, at December Term, 1867, reversed the decree of the District Court, and remanded the cause, with directions to restore the vessel to the claimant, without costs. Mr. Justice Nelson, in delivering the opinion, said that the only question in the case was whether the vessel was the property of enemies of the United States; and, in discussing this question, observed that upon the proofs that the claimant built the vessel and put the master in command in this, her first voyage, the presumption would seem to be very strong, if not irresistible (nothing else in the case), that he continued the owner for the short period of six months that elapsed after she was built and before the seizure took place; that in addition to this she was in command of a master claiming to represent Laird as owner; that these acts, in connection with the registry, afforded strong evidence that the title of the vessel was in the claimant, and that, although it was not unnatural to suspect, from the surrounding facts and circumstances, that the so-called Confederate States or their agents had some interest in or connection with her, there was no sufficient legal proof that they owned the vessel.

After that decree of this court, Foster & Thomson made and sent to Prioleau a draft of a power of attorney to be executed by Laird and by Stiles, and in due time received from Prioleau the power so executed, authorizing Foster and Thomson to receive from the United States, or from any officer or depositary thereof, restitution of the proceeds of the sale of the "Wren;" and obtained a mandate from this court, and sent it, together with a copy of their authority, to the Attorney of the United States for the Southern District of Florida, requesting him to see the appropriate decree entered and a draft upon the Assistant Treasurer in New York for the payment of the money to their order transmitted to them, and also employed F. A. Dockray, an attorney in Florida, to aid them in procuring the money from the registry of the court; and did not, in any of their letters to the District Attorney or to Dockray, mention that any other person than Laird was or pretended to be the owner of the fund in court.

Some of the libellants in this case having filed a libel in that court to recover for the wrong complained of in the present

suit, with a prayer for an attachment of the fund in the registry, and an attachment having been made accordingly, an arrangement was made between Foster & Thomson and J. L. Ward, proctor for the libellants, with a view of transferring the litigation to New York for the convenience of the parties, and of having the fund transmitted to Foster & Thomson in New York, as authorized attorneys in fact of Laird, to be held by them long enough to enable process to be served upon them in behalf of the libellants. Pursuant to that arrangement, Dockray, acting under his employment by Foster & Thomson, appeared in behalf of Laird in the libel filed against him in Florida, and claimed the proceeds of the "Wren" in the registry of that court, and exhibited the mandate of this court; and upon his motion, with Ward's consent, the attachment was dismissed, and a decree entered, by which, after reciting the decree of this court reversing the decree of condemnation and ordering the property to be restored to the claimant, it was ordered, adjudged, and decreed that the proceeds of the "Wren," after deducting costs, charges, and expenses, and amounting to $31,441.62, on deposit with the Assistant Treasurer of the United States at New York, be paid to said John Laird, claimant, and, it appearing that Foster & Thomson were his lawfully authorized attorneys, that said proceeds be paid to them. That sum was accordingly transmitted to Foster & Thomson, and is the matter in controversy in this case. In the course of the negotiations which preceded that arrangement, Ward was in no manner given to understand that there was any ownership or claim of ownership of the fund, other than such as appeared on the face of the record and the power of attorney filed with the mandate, and in point of fact he did not know or have any reason to believe that Foster & Thomson were acting in any other capacity than as attorneys for Laird and Stiles, representing their several interests, as disclosed by the record in this court. Foster & Thomson never had any personal communication with Laird, nor received any instructions from him, but were actually employed by Prioleau, and communicated with Laird through him only.

The libellants requested the Circuit Court to make the following conclusions of law: "1. The Prize Court in Florida

condemned the 'Wren' as enemy property. 2. The Supreme Court in reversing that decree decided that the 'Wren' was not enemy property, but was the property of John Laird, Jr. 3. The garnishees, acting for Prioleau, procured the Supreme Court to make that decision. 4. Prioleau is chargeable with notice of all the proceedings in the Prize Court and in the Supreme Court. 5. The proceeds of the 'Wren' in the Prize Court were subject to the attachment served upon them in the District Court of Florida at the time when the consent of the libellants' proctor to the dissolution of such attachment was obtained. 6. The decision of the Supreme Court binds the garnishees herein and Prioleau, and is conclusive against them, and cannot be re-examined in this suit. 7. Prioleau is estopped from denying in this suit that John Laird, Jr., was the owner of the 'Wren,' and of the proceeds thereof when the same were attached herein. 8. The garnishees are estopped from setting up that these funds in their hands are not subject to the attachment in this suit; and also from setting up that John Laird, Jr., was not the owner thereof, or that Prioleau was the owner thereof, when the attachment herein was served."

The Circuit Court declined to make the conclusions of law proposed by the libellants, and made and filed the following conclusions of law: "1. As Prioleau was in fact the owner of the 'Wren' at the time of her capture, he was in law the owner of the proceeds in the registry of the court after her sale. 2. The sentence of acquittal in the prize cause relieved the fund in court from all claim on the part of the captors, and left the owners free to assert their rights as against the world. 3. The decree in the prize suit did not adjudge the fund to Laird as owner, or deprive Prioleau of his interest. 4. The delivery of the fund to Foster & Thomson, as agents of Laird, placed them in the same situation in respect to it that would have been occupied by Laird if it had been put into his hands instead of theirs. 5. As Laird was not the real, but only the apparent, owner of the fund, he would have taken it, if payment had been made to him, in trust for Prioleau. 6. Foster & Thomson, as his agents, hold it upon the same trust, and are not accountable to the libellants in this action. 7. The decree of the District Court, requiring Foster & Thomson to pay the fund

into court, and subjecting it to the payment of the amount found due the libellants from Laird, was wrong and should be reversed."

The Circuit Court allowed a bill of exceptions tendered by the libellants, in which they excepted to each of its conclusions of law, and to its refusal to make each of the conclusions of law proposed by them.

The libellants appealed from the last decree of the Circuit Court in favor of the garnishees; the garnishees appealed from the earlier decree of that court, dismissing their appeal from the first order of the District Court against them; and the two appeals have been argued together.

In a court of admiralty, as in a court of common law, a process of foreign attachment is auxiliary and incidental to the principal cause. Second Rule of Practice in Admiralty, 3 How. iii. *Manro* v. *Almeida*, 10 Wheat. 473; *Atkins* v. *The Disintegrating Company*, 18 Wall. 272. Neither the principal defendant nor the garnishees can appeal until after a final decree against them. The first decree against these garnishees, ascertaining their liability, was interlocutory only, and, if the libellants had ultimately failed to recover judgment against the principal defendant and execution against the garnishees, would have been of no avail to the libellants, and of no effect against the garnishees. The appeal of the garnishees from this interlocutory order of the District Court was therefore rightly dismissed by the Circuit Court, and the order of dismissal must be affirmed.

Upon the merits of the case, as presented by the appeal of the libellants from the final decree of the Circuit Court in favor of the garnishees, this court, after full consideration of the elaborate arguments of counsel, is satisfied of the correctness of that decree upon principle and authority.

Prize courts are not instituted to determine civil and private rights, but for the purpose of trying judicially the lawfulness of captures at sea, according to the principles of public international law, with the double object of preventing and redressing wrongful captures, and of justifying the rightful acts of the captors in the eyes of other nations. The ordinary course of proceeding in prize causes is ill adapted to the ascertainment of

controverted titles between individuals. It is wholly different from those which prevail in municipal courts of common law or equity, in the determination of questions of property between man and man.

In *Lindo* v. *Rodney*, 2 Doug. 613, 614, Lord Mansfield said: "The end of a prize court is, to suspend the property till condemnation; to punish every sort of misbehavior in the captors; to restore instantly, *velis levatis* (as the books express it, and as I have often heard Dr. Paul quote), if, upon the most summary examination, there don't appear a sufficient ground; to condemn finally, if the goods really are prize, against everybody, giving everybody a fair opportunity of being heard. A captor may, and must, force every person interested to defend, and every person interested may force him to proceed to condemn, without delay."

From the necessity of the case, and in order to interrupt as little as may be the exercise of the belligerent duties of the captors, or the voyage and trade of the captured vessel if neutral, the proceedings are summary. The libel is filed as soon as possible after the prize has been brought into a port of the government of the captors, and does not contain any allegation as to title, nor even set forth the grounds of condemnation, but simply prays that the vessel may be forfeited to the captors as lawful prize of war. The monition issued and published upon the filing of the libel summons all persons interested to show cause against the condemnation of the property as prize of war, and is returnable within a very few days, too short a time to allow of actual notice to or appearance or proof in behalf of owners residing abroad.

The law of nations presumes and requires that in time of war every neutral vessel shall have on board papers showing her character, and shall also have officers and crew able to testify to facts establishing her neutrality. The captors are therefore required immediately to produce to the Prize Court the ship's papers, and her master, or some of her principal officers or crew, to be examined on oath upon standing interrogatories, and without communication with or instruction by counsel. The cause is heard in the first instance upon these proofs, and if they show clear ground for condemnation or for acquittal, no

further proof is ordinarily required or permitted. If the evidence *in preparatorio* shows no ground for condemnation, and no circumstances of suspicion, the captors will not ordinarily be allowed to introduce further proof, but there must be an acquittal and restitution. *The Aline & Fanny*, Spinks Prize Cases, 322, and 10 Moo. P. C. C. 491; *The Sir William Peel*, 5 Wall. 517, 534. When further proof is ordered, it is only from such witnesses and upon such points as the Prize Court may in its discretion think fit.

It is doubtless true, as said by Chief Justice Marshall in the passage cited by these libellants from *Jennings* v. *Carson*, 4 Cranch, 2, 23, that "the proceedings of that court are *in rem*, and their sentences act on the thing itself. They decide who has the right, and they order its delivery to the party having the right. The libellant and the claimant are both actors. They both demand from the court the thing in contest." But the point there adjudged was that, pending the proceedings, the property was in the possession of the court, and not left in the possession of either party, without security; and there is no intimation that a claimant, who proves his right, as against the captors, to have the possession of the vessel restored to him, must also prove his title in the vessel as against other persons not before the court.

The Prize Court will not indeed permit a stranger to dispute the right of the captors, and generally requires a claim to be made by or in behalf of the general owner, and upon oath. But the claimant is required to give evidence of a title to the property, not for the purpose of having that title established by the decree of the Prize Court, but only for the purpose of showing that he is acting in good faith, and is entitled to contest the question of prize or no prize, and to have restitution of possession in case of acquittal. From the necessity of the case, the claim is often put in by the master on behalf of the owner, and it is sufficient if the master's oath is to belief only.

By the practice prevailing in England at the time of the Declaration of Independence, and for some years before and after, the master often put in a general claim for himself and all others interested, without naming them. *The Hendric &*

Alida, Marriott, 96, 99, 123; *The Prospérité*, id. 164; *The Jungfre Maria*, id. 273, 283. In the report made in 1753 by Sir George Lee, Judge of the Prerogative Court, Dr. Paul, Advocate-General, Sir Dudley Ryder, Attorney-General, and afterwards Chief Justice, and Mr. Murray, Solicitor-General, and afterwards Lord Mansfield, which was embodied in the famous answer to the Prussian Memorial, the only requisite mentioned of a claim of ship or goods is that it "must be supported by the oath of somebody, at least as to belief." 1 Collectanea Juridica, 129, 135. Sir William Scott and Sir John Nicholl, in their letter to Chief Justice Jay when Minister to England in 1794, stating the general principles of proceeding in prize causes in British courts of admiralty, observed that those principles could not be more correctly or succinctly stated than in an extract which they gave from that report, including the passage just quoted; and, in describing the measures which ought to be taken by the neutral claimant, said, "The master, correspondent, or consul applies to a proctor, who prepares a claim, supported by an affidavit of the claimant, stating briefly to whom, as he believes, the ship and goods claimed belong, and that no enemy has any right or interest in them." Wheaton on Captures, 311, 314.

It has often been said by judges of high authority that the claimant has the burden of proving his title to the property. But in the leading cases in which this was said there was but a single claimant, and either, as in *The Walsingham Packet*, 2 C. Rob. 77, 87, and *The Bremen Flugge*, 4 id. 90, 92, the words "support his title" were used as equivalent to the general expression "prove the neutrality of the property;" *Croudson* v. *Leonard*, 4 Cranch, 434, 437; *The Mary*, 9 Cranch, 126, 146; Story's note, 1 Wheat. 506; *The Amiable Isabella*, 6 Wheat. 1, 77; or else the neutral claimant asserted a title in property appearing to have once belonged to an enemy, as in *The Rosalie & Betty*, 2 C. Rob. 343, 359; *The Countess of Lauderdale*, 4 id. 283; and *The Soglasie*, 2 Spinks, 101; s. c. Spinks Prize Cases, 104. And in *The Maria*, 11 Moo. P. C. C. 271, 286, 287, Lord Chief Justice Cockburn, delivering the judgment of himself, Lords Justices Knight Bruce and Turner, Sir Edward Ryan, Sir John Dodson, and Mr. Justice

Maule, reversing upon the facts a decree of Dr. Lushington, emphatically declined to assent to the application of the rule to a case in which the property appeared to be neutral, although not shown to belong to the claimant.

The proceedings of a prize court being *in rem*, its decree, as is now universally admitted, is conclusive, against all the world, as to all matters decided and within its jurisdiction. *Williams* v. *Armroyd*, 7 Cranch, 423; *Bradstreet* v. *Neptune Ins. Co.*, 3 Sumn. 600. But it does not, as Chief Justice Marshall observed, "establish any particular fact, without which the sentence may have been rightfully pronounced." If the vessel is condemned as prize and sold by order of the court, the decree of condemnation and sale is conclusive evidence of the lawfulness of the capture and of the title of the purchaser. But if, as is usual, it does not state the ground of condemnation, it is not even conclusive that the vessel is enemy's property, for it may have been neutral property condemned for resisting a search, or attempting to enter a blockaded port; and, "of consequence, this sentence, being only conclusive of its own correctness, leaves the fact of real title open to investigation." *Maley* v. *Shattuck*, 3 Cranch, 458, 488.

So a decree of acquittal and restitution conclusively determines as to all the world that the vessel is not lawful prize of war. *The Apollon*, 9 Wheat. 362; *Magoun* v. *New England Marine Ins. Co.*, 1 Story, 157. But, as it operates *in rem*, it is not invalidated by the fact that pending the proceedings the sole claimant has died and his representatives have not been made parties. *Penhallow* v. *Doane*, 3 Dall. 54, 86, 91; Story's note, 2 Wheat. Appendix, 68; 3 Phillimore's International Law, sect. 492. It does not establish the title of any particular person, unless conflicting claims are presented to the court and passed upon. In *Penhallow* v. *Doane*, Mr. Justice Iredell said: "In case of a *bona fide* claim, it may appear to be good by the proofs offered to the court, but another person living at a distance may have a superior claim which he has no opportunity to exhibit. It is true a general monition issues, and this is considered notice to all the world, but though this be the construction of the law from the necessity of the case, it would be absurd to infer in fact that all the world had actual notice,

and therefore no superior claimant to the one before the court could possibly exist." 3 Dall. 91.

When no other person interposes a claim, restitution of ship or goods is ordinarily decreed to the master as representing the interests of all concerned, or to the person who by the ship's papers or by the master's oath appears to be the owner. As said by Mr. Justice Story, and repeated by Sir Robert Phillimore, "The property, upon a decree of restitution, may be delivered to the master as agent of the shipper, for in such case the master is agent of the shipper, and is answerable to him." 2 Wheat. Appendix, 70; 3 Phillimore's International Law, sect. 495. See Letter of Sir William Scott and Sir John Nicholl to Chief Justice Jay, above cited; and *Rose* v. *Himely*, 4 Cranch, 241, 277, in which Chief Justice Marshall said: "Those on board a vessel are supposed to represent all who are interested in it, and if placed in a situation which requires them to take notice of any proceedings against a vessel and cargo, and enables them to assert the rights of the interested, the cause is considered as being properly heard, and all concerned are parties to it."

Even when conflicting claims of title are put in, the Prize Court will not ordinarily determine between them, unless one of the claimants is a citizen of its own country.

Thus, in a case in which an American vessel was taken by the Danes, and captured from them by an English ship of war and brought into the High Court of Admiralty as prize; the master made affidavit that he had previously sold her, under the pressure of necessity, by reason of injuries from perils of the sea, to one Ormsby, an American, from whom the Danes took her; and separate claims were presented in behalf of Ormsby and of Coit and Edwards, also Americans, who were admitted to be the original owners, and whose names appeared as such in the register and other papers of the ship, — Sir William Scott, after observing upon the circumstances attending the sale by the master, said: "But the court is not called upon to determine upon the validity of the title, which may be matter of discussion hereafter in the American courts. It is only required to give possession." "The ship's register and all the papers point to Coit and Edwards as the owners of the vessel,

and I have no hesitation in restoring the possession to them." "I therefore restore the possession of the vessel to the persons appearing by the register and ship's papers to be the owners, without prejudice to such rights as Mr. Ormsby, or any other persons, may have acquired by purchase, or otherwise as shall appear to the proper court of justice in America." *The Fanny & Elmira*, Edw. Adm. 117, 120, 121.

In *The Lilla*, 2 Sprague, 177, affirmed on appeal, 2 Cliff. 169, an American vessel owned by Maxwell, a citizen and resident of Maine, was taken by a Confederate privateer and carried into Charleston, South Carolina, and there condemned and sold by a tribunal, acting under the assumed authority of the Confederate States, to persons who took her to England, where she was registered in the name of one Bushby, after which she was captured on the high seas and brought in by a United States gunboat. Claims were presented by Maxwell and by Bushby, and after hearing counsel in behalf of each claimant, as well as of the captors, the court decided against the claim of Bushby, and ordered the vessel to be restored to Maxwell, on condition of payment of salvage to the recaptors. But the opinion of Judge Sprague shows that jurisdiction over the question of title was exercised only to protect the rights of one of our own citizens against foreigners to property in the possession of the court, and that if the question of ownership were wholly between foreigners, the court might refuse to decide it. 2 Sprague, 187.

As incidental to the question of the lawfulness of the capture, prize courts have doubtless jnrisdiction to determine the liability of the captors for damages, expenses, and costs, occasioned by their own wrongful acts, or by the fault of those in charge of the prize while in their custody. *Le Caux* v. *Eden*, 2 Doug. 594, 610; *The Siren*, 7 Wall. 152; 1 Kent, Com. 359. But the learning and research of counsel have failed to furnish a single case, where there was but one claimant of property libelled as prize of war, in which a prize court has undertaken to pass upon the validity of his title as against other persons, or in which its decree has been set up in a subsequent suit as an adjudication of that title as between him and them.

All the proceedings in the case of the "Wren" were accord-

ing to the usual practice in prize causes. The libel was filed within three days, and the monition was returnable, and the hearing upon the evidence *in preparatorio* had, within fourteen days after the capture. The only claim put in was by the master, under oath, stating positively that he was the master and as such lawful bailee of the vessel, and claimed her for the owner. The further statement in the claim that Laird, and no other person, was the true and *bona fide* owner of the vessel, was only upon information and belief, and reference to her register in the possession of the court. That register was dated at Liverpool six months before, showed Laird to have been the owner, and had at its foot a memorandum stating that by the Merchant Shipping Act 1854 (St. 17 & 18 Vict. c. 104) it was not a document of title, and did not necessarily contain notice of all changes of ownership. The court ordered further proof from certain witnesses on specified interrogatories to be taken forthwith, and, after a final hearing upon the whole evidence, announced, within twenty-two days from the filing of the libel, its decree of condemnation, which was afterwards entered in form.

The decree of this court on appeal merely reversed the decree of condemnation and directed the vessel to be restored to the claimant. The references in the argument of counsel before this court, and in its judgment delivered by Mr. Justice Nelson, to the evidence upon the question whether she was the property of Laird or of other persons, were only by way of assisting in the determination of the sole question at issue, whether she was or was not enemy's property and therefore lawful prize. *The Wren*, 6 Wall. 582. The final decree of the District Court recited the decree and mandate of this court, and in conformity therewith ordered the proceeds to be paid to Laird, the person appearing to be the owner by the ship's papers and according to the best information and belief of the master, as stated in the claim put in by him. Neither the decree of this court nor the subsequent decree of the District Court determined, or assumed to determine, any question of title as between Laird and Prioleau or other persons who had not appeared in the cause nor contested Laird's claim.

The libellants, in this suit against Laird personally, and

against Foster & Thomson as his garnishees, have the burden of proving that the fund in the hands of the garnishees belongs to Laird. There is nothing in the acts of Prioleau, or of the garnishees as his attorneys, which estops the garnishees to deny that fact and to put the libellants to proof of it. He had no knowledge of the prize proceedings until after the decree of condemnation. Having a title to the vessel under the bill of sale from Laird, he prosecuted the appeal from that decree in Laird's name and by Laird's authority. Whatever effect Prioleau's omission to disclose his own interest might have had, if discovered, upon the issue in the prize cause, or might have, by way of estoppel, if the present suit were brought by the United States, he has done nothing which Laird or Laird's creditors have been misled by or have acted upon. The title in the vessel, as between Laird and Prioleau, was in Prioleau. The garnishees, being attorneys both of Laird and of Prioleau, received the proceeds in the name of Laird, but for Prioleau. There being no estoppel, either of record or *in pais*, the libellants fail to prove that the fund belongs to Laird, and cannot therefore maintain their attachment.

This case does not present the question whether if Prioleau were plaintiff or actor, seeking affirmative relief against Laird or against these libellants, he must be considered as standing in such a position, by reason of his having concealed from the Prize Court his own title to the vessel, and of his having permitted restitution to be decreed to Laird, that the court would decline to assist him, upon the principle applied in *De Metton* v. *De Mello*, 12 East, 234, and 2 Camp. 420.

Decrees affirmed.

MR. JUSTICE BLATCHFORD did not sit in this case, nor take any part in deciding it.

SCHMIDT v. BADGER.

Under schedules B and D of sect. 2504 of the Revised Statutes, ale and beer imported in bottles is subject to a duty of thirty-five cents per gallon, and a further duty of thirty per cent *ad valorem* is imposed on the bottles.

ERROR to the Circuit Court of the United States for the Southern District of Louisiana.

The facts are stated in the opinion of the court.

Mr. Charles W. Hornor for the plaintiffs in error.

The Solicitor-General, contra.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This suit was brought to recover back customs duties paid under protest on glass bottles containing beer and ale, imported from abroad. The collector exacted a duty of thirty per cent *ad valorem* on the bottles. The plaintiffs contended that as a duty of thirty-five cents per gallon had been paid on the contents of the bottles, such duty covered all which the law imposed on the bottles. There was a verdict for the defendant under a charge by the court to the jury that, although a duty of thirty-five cents per gallon had been paid on the contents of the bottles, a further duty of thirty per cent *ad valorem* was chargeable on the bottles. After a judgment for the defendant the plaintiffs sued out this writ of error.

The importations in question were made in February and March, 1881. In order to a clear understanding of the statutory provisions in force at that time it will be useful to trace the course of legislation on the subject.

It was enacted by sect. 3 of the act of Jan. 29, 1795, c. 17, that the duty on any wines imported into the United States shall not be less than ten cents per gallon, "and that bottles in which any liquor is imported shall be subject to the payment of the like duty as empty bottles."

By sect. 8 of the act of Aug. 30, 1842, c. 270, duties were imposed on various liquors and wines, in casks and in bottles, at so much per gallon, the duty on importations in casks being never higher than on importations in bottles, and generally

much lower, and it was enacted that "when wines are imported in bottles, the bottles shall pay a separate duty." The same section provided that ale, porter, and beer in bottles should pay twenty cents per gallon, and otherwise than in bottles, fifteen cents per gallon. The same act imposed a duty on bottles.

By sect. 6 of the act of March 2, 1861, c. 68, it was provided that "brandies or other spirituous liquors may be imported in bottles, when the package shall contain not less than one dozen, and all bottles shall pay a separate duty, according to the rate established by this act, whether containing wines, brandies, or other spirituous liquors." The same section imposed a duty on ale, porter, and beer in bottles, of twenty-five cents per gallon, and otherwise than in bottles, fifteen cents per gallon. The seventeenth section of the same act imposed a duty of thirty per cent *ad valorem* on "all glass bottles or jars filled with sweetmeats, preserves, or other articles." Here was a duty on the bottles containing liquors, wines, or ales, as well as on the contents.

By sect. 2 of the act of June 30, 1864, c. 171, it was provided that the separate duty on bottles "containing wines, brandies, or other spirituous liquors subject to duty" should be two cents each; and that the duty on ale, porter, and beer in bottles should be thirty-five cents per gallon, and otherwise than in bottles, twenty cents per gallon. By sect. 9 of the same act, a duty of forty per cent *ad valorem* was imposed on "all manufactures of glass . . . not otherwise provided for, and all glass bottles or jars filled with sweetmeats or preserves, not otherwise provided for." Here was a duty on the bottles containing liquors and ales, in addition to the duties on their contents, although the duty on bottles containing ale was expressed as an *ad valorem* duty on manufactures of glass, not otherwise provided for, and the duty on bottles containing liquors was expressed as a duty of two cents each.

By sect. 21 of the act of July 14, 1870, c. 255, the same rate of duty per gallon was imposed on wines imported in bottles as on wines imported in casks, and a duty of three cents in addition was imposed on each bottle; and the same section further provided that "wines, brandy, and other spirituous liquors imported in bottles shall be packed in packages containing not

less than one dozen bottles in each package, and all such bottles shall pay an additional duty of three cents for each bottle." Under this act it was held by this court that each bottle containing champagne wine was subject to a duty of three cents in addition to the duty on the champagne wine. *De Bary* v. *Arthur*, 93 U. S. 420.

We now come to the Revised Statutes, under which the duties in the present case were collected. Schedule D of sect. 2504 imposes the following duties: "Ale, porter, and beer in bottles: thirty-five cents per gallon; otherwise than in bottles: twenty cents per gallon." This is taken from sect. 2 of the act of June 30, 1864, c. 171. The same schedule contains the foregoing provisions from the act of July 14, 1870, c. 255, as to the duty per gallon on wines imported in bottles, and as to the additional duty of three cents on each bottle, and as to the additional duty of three cents for each bottle on bottles containing wines, brandy, and other spirituous liquors. Schedule B of the same section imposes the following duties: "Glass bottles or jars filled with articles not otherwise provided for: thirty per centum *ad valorem*." "All manufactures of glass . . . not otherwise provided for, and all glass bottles or jars filled with sweetmeats or preserves, not otherwise provided for: forty per centum *ad valorem*." The act of 1861 had imposed a duty of thirty per cent on "glass bottles or jars filled with sweetmeats, preserves, or other articles." The act of 1864 had imposed a duty of forty per cent on "glass bottles or jars filled with sweetmeats or preserves," thus leaving a thirty per cent duty on glass bottles filled with articles other than sweetmeats or preserves. So the act of 1864 had imposed a duty of forty per cent on manufactures of glass, not otherwise provided for. Thus these provisions went into the Revised Statutes.

In the sentence "glass bottles or jars filled with articles not otherwise provided for," there is no comma between "jars" and "filled" and there is no comma between "articles" and "not." Yet the sentence must be read as if there were a comma in each place. The act of 1861 imposed a duty of thirty per cent on glass bottles filled with sweetmeats, preserves, or other articles. This was not a duty on the contained articles and on the bottles also. It was not a duty of thirty per cent

on the contents of every glass bottle. It was a duty merely on the bottles. The articles imported in the bottles were subject to such duty, if any, as was elsewhere imposed on them. The act of 1864 imposed a duty of forty per cent on glass bottles filled with sweetmeats or preserves, thus raising the duty on such bottles by ten per cent, while the duty on glass bottles filled with other articles than sweetmeats or preserves was left to stand at thirty per cent; and in that shape these provisions went into schedule B of sect. 2504 of the Revised Statutes. They are found in a schedule which relates solely to earths, and earthenware and glass. The act of 1864 imposed a duty of forty per cent on all manufactures of glass not otherwise provided for, and that provision, being in force, went into the same schedule B.

The principle of imposing a duty on the sack, box, or covering of any kind in which a dutiable article is imported, separate from and additional to the duty on such article, is applied by sect. 2907 of the Revised Statutes, which declares that the value of the sack, box, or covering of any kind in which imported merchandise is contained shall be added in determining the dutiable value of such merchandise. This provision is enacted from sect. 9 of the act of July 28, 1866, c. 298. Where the covering is a glass bottle, and the duty on its contents is a specific duty per gallon, and not an *ad valorem* duty, a duty on the bottle, when added, is to be added as a duty of so much per bottle or as an *ad valorem* duty, as the statute may enact. But it is no reason for saying that the bottles are not dutiable in addition to their contents, that a higher rate of duty is imposed on the contained article when imported in bottles than when imported otherwise than in bottles. If a reason is to be sought for, it may well be found in the fact that, while imposing a duty on the bottle, in analogy to the duty on the sack, box, or covering, the statute desires to encourage the bottling here of the article imported in the bottles, by imposing a higher duty on the importation of it in bottles than on the importation of it otherwise than in bottles.

Under this view the statute reads and means that glass bottles which are not otherwise provided for, and are filled with articles, shall pay a duty of thirty per cent. If they were to

be regarded as manufactures of glass, not otherwise provided for, they would pay forty per cent; or if, under schedule B of sect. 2504, they were to be regarded as plain, or mould, or press glass, they would pay thirty-five per cent. But as they are clearly bottles they are to pay only thirty per cent.

By sect. 2 of the act of Feb. 8, 1875, c. 36, it is expressly enacted that no separate or additional duty shall be collected on the bottles in which still wines are imported. The additional duty on bottles in which other articles than still wines are imported is left undisturbed.

It is manifest, we think, in view of the course of legislation by Congress, that an enactment that the duty on ale, porter, and beer in bottles shall be so much per gallon, cannot be regarded as an enactment that there shall be no additional duty on the bottles, when there is another provision of law which imposes an *ad valorem* duty on bottles, not otherwise provided for, filled with articles.

It is contended by the plaintiffs in error that all duty on the bottles is included in the duty of thirty-five cents per gallon on the ale "in bottles." Reliance for this view is had on the decision of Chief Justice Taney in *Karthaus* v. *Frick*, Taney's Dec. 94, in 1840, where it was held that, under a statute imposing a duty on salt of ten cents per fifty-six pounds, an *ad valorem* duty could not in addition be imposed on the sacks in which the salt was imported, as manufactures of hemp. That decision is placed expressly on the ground that there was no instance where a separate duty had been laid on the vessel or receptacle containing an article, when a specific duty was laid upon the article. That case arose under the act of July 14, 1832, c. 227, and stress was laid in the decision on the analogous fact that, while there was in the act a duty on bottles, there was no duty on bottles containing any article, but only a duty on the article in the bottles. This has all now been changed, and there is a duty on coverings, and on bottles containing articles, as well as on the same articles imported in bottles.

Judgment affirmed.

HALL v. MACNEALE.

1. Whether claim 3 of letters-patent No. 67,046, granted to Joseph L. Hall, July 23, 1867, for an "improvement in connecting doors and casings of safes," — namely, "3. The conical or tapering arbors, 1, in combination with two or more plates of metal, in the doors and casings of safes and other secure receptacles, the arbors being secured in place in the plates by keys, 2, or in other substantial manner," — claims arbors which are tapped into two or more plates, or whether it excludes, as a part of it, screw-threads cut on the arbors, is immaterial in the present case, because, under the former view, the defendants are not shown to have used arbors with screw-threads on any part of the arbor within the plates, and, under the latter view, the claim is invalid.
2. The whole invention is described in letters-patent No. 30,140, granted to Hall, Sept. 25, 1860, for an "improvement in locks," and a cored conical bolt with a screw-thread on it is shown in those letters. A solid conical bolt having existed, adding the screw-thread to it is not an invention.
3. Solid conical bolts without screw-threads having been used in two safes made and sold by the inventor more than two years before his letters were applied for, the invention covered by claim 3 was in public use and on sale, with his consent and allowance, so as to make the claim invalid under sects. 7 and 15 of the act of July 4, 1836, c. 357, and sect. 7 of the act of March 3, 1839, c. 88.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

The case is fully stated in the opinion of the court.

Mr. Thomas A. Logan and *Mr. Edward N. Dickerson* for the appellant.

Mr. James Moore for the appellees.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This suit is brought on letters-patent No. 67,046, granted to Joseph L. Hall, the appellant, July 23, 1867, for an "improvement in connecting doors and casings of safes." The only claim alleged to have been infringed is claim 3, which is in these words: "3. The conical or tapering arbors, 1, in combination with two or more plates of metal, in the doors and casings of safes and other secure receptacles, the arbors being secured in place in the plates by keys, 2, or in other substantial manner." In regard to what is embraced in this claim the

specification says: "The nature of this invention consists in . . . securing a series of plates forming a casing or door of the safe by means of conical or tapering arbors, which, being tapped in from the outside of the door or casing, and keyed upon the inside, present serious obstacles to the removal of successive plates forming the body of the safe. Figure 1 represents a perspective view of a safe embodying my invention. Figure 2 is a horizontal section of part of the same. Figure 3 is a detail view, in cross-section, of the door of the safe, showing the shape of, and manner of securing, an arbor. The most approved manner of securing together the numerous plates forming the casings and doors of safes is by means of screws tapped in from one series of pairs or triplets of plates from the inside, presenting no rivet heads upon the outside surface of the safes. . . . In the doors of safes the outer plate D is secured to the plates E F by screws *b*, counter-sunk in the plate F. . . . The fourth plate, I, has about the same area as the plate E. It is secured to the plate F by screws *e*, which pass through the inner plate K, in which they are counter-sunk. . . . In order to still further secure together the plates forming the door of the safe, I use a conical arbor, 1, or a number, if necessary; they are introduced in openings through the series of plates, being tapped into the two innermost of all the plates, and keyed in position. A smooth surface in the plane of the outer face of the door is presented, giving no means of removing the arbors, 1, even should the key, 2, be removed. . . . Since the doors of safes are more exposed than any other part of them, it is necessary to embody in their construction such devices, which in themselves are the simplest, as shall effectually bar forcible entrance to the safes. The introduction of arbors for the purpose of more effectually binding in one compact mass the series of alternate iron and steel plates in the doors or bodies of safes will very much protract the labors of the burglar; indeed, it will be necessary, in order to remove one sheet in succession, to cut out the arbors, which are made of the hardest steel. The arbors may be tapped through the entire series of plates, and the inner end rivet-headed instead of keyed, as shown in the drawing, or the inner plate, as well as other in the series of plates, may be put together in sections, and, fitting into notches in the arbor

or arbors, secure them in position. In this latter construction the arbors need not be conical, but may have any cross-section, tapering longitudinally."

When the specification says that the conical arbors are "tapped in from the outside," it means that screw-threads are cut on them and take into screw-threads in the body, and that the arbors are screwed in and have their smaller end towards the inside. The drawing, Figure 3, shows this, there being five plates, and the arbor being in position, and tapering from the outside to the inside, the larger end being towards the outside, and a screw-thread being cut on the arbor for the distance of the thickness of the two innermost plates, and the arbor extending through the five plates, from the outer surface of all to the inner surface of all, and a key extending from the inside, lengthwise of the arbor, the distance of the length of the screw-thread. The arbors, the specification says, "may be tapped through the entire series of plates," that is, the entire length of the arbor may have a screw-thread cut on it, and the inner end may be rivet-headed, that is, headed down into a rivet instead of being keyed. A peculiarity of the conical arbors is stated in the specification to be that they are tapped in "from the outside" and "keyed upon the inside," in contradistinction to the then existing most approved method of having screws with conical heads, the heads being counter-sunk in one of the plates, and the cone shape of the heads holding the screws so as to make it unnecessary to rivet them on the outside of the safe, the screws not going through all the plates, the head of the screw being towards the inside of the safe, and the other end of it not projecting beyond the outside. Whether claim 3, in claiming "*the* conical or tapering arbors 1 in combination," &c., is to be held, in view of the description in the text of the specification, and of the drawing, Figure 3, to necessarily claim arbors which are tapped into two or more plates, or whether that claim excludes as a part of it screw-threads cut on the arbors, is not material to this case. If the former, the appellees are not shown to have used arbors with screw-threads on any part of the arbor that is within the plates. If the latter, then, infringement being shown, we are satisfied that claim 3 cannot be sustained. The contention of the appellant is, that the

invention covered by that claim requires only a conical hole, conical through the entire series of plates to be secured, and a conical bolt corresponding thereto, and secured in place in the plates by a key, or in any other substantial manner.

A patent was issued to the appellant Sept. 25, 1860, for an "improvement in locks." The specification of that patent says: "Resting upon the front plate B of the lock, as shown in Figure 4, are seen two conical blocks, I I', a plan of which is represented in Figure 11. These are precisely alike in their construction, and they are adapted to the two stems G and H, as will appear. They are of a length corresponding with the thickness of the door M to which the lock is applied, so that, when introduced into appropriate apertures in the door, their outer faces will be flush with the outer face of the door, and their inner faces flush with the inner face of the door, and against the front face of the lock, when the same is properly fixed upon the door. The blocks I I' enter their apertures in the door by a screw-thread, and they are held from turning therein, so as to return outwardly, by an ordinary key driven into a key-seat drilled from the inside of the door before the lock is applied to its place. . . . The conical blocks are cored or drilled out in a peculiar manner to receive the two-part revolving arbor, as shown, the part p (p'), entering the narrow end of the conical blocks, being of a cylindrical form, and the part q (q'), entering the large end of the conical blocks, being of a conical form." These revolving arbors turn the stems G and H, and thus the tumblers are adjusted and the bolt of the lock is thrown. The drawing of the patent shows the conical blocks I I' as passing entirely through the door, the larger end of the cone on the outside, and each end flush with its proper face. These conical blocks were screw-threaded on their surface in the door, and were keyed from the inside. They were cored, to admit the revolving arbors, but their bodies operated in all respects like the conical arbors of the patent sued on.

In 1868 John Farrell and Jacob Weimar applied for a patent for the same thing covered by claim 3 of the patent sued on, and the Patent Office declared an interference between their application and that patent. The appellant was examined as a witness on his own behalf, in October, 1868, in that interfer-

ence, and testified as follows: "*3d Int.* State what knowledge you have had, in manufacturing safes, of the use of a series of plates united by conical bolts made drill-proof, and when and where you first had knowledge of their use. *Ans.* The first was in the year 1858 or 1859. I came across one John P. Lord's lock, which was said to be a combination, no-key-hole bank lock. I negotiated with the parties representing it, to try and introduce it and manufacture it. I then began to examine into it more particularly, and found that the knob or dial projecting through the door seemed to be very insecure in its construction. I set myself about so as to invent some better way of securing the protection to the lock and also the plates of the doors. I then invented a double and single conical-shaped arbor or plug, made drill-proof, composed of wrought-iron and steel welded together, the design of which was to fully protect the lock against sledge-hammers or other tools for driving the plug or plugs in, or from being drilled into, they being hardened. The further design of the said drill-proof plugs or arbors was to secure together a series of plates of wrought-iron and steel or other suitable metal whereby they could not be separated or pulled apart, more firmly binding them together than had been our former method of making safes, or joining together such series of plates. Some time after, during the year 1859 or 1860, the exact period of time I cannot remember fully, we made burglar-proof safes of a series of plates composed of iron and steel joined together, in which we had used more of the conical drill-proof bolts or arbors than we had formerly been in the habit of doing, for the express purpose of more securely fastening the plates together. We made them in the city of Cincinnati, in our factory, which was situated about the middle of the square bounded by Columbia, Sycamore, Front, and Main Streets. We have also used them to a very considerable extent since that time, in our factory situated at the southwest corner of Plum and Pearl Streets. I secured a patent for my double conical drill-proof arbor in the year 1860. My design of that was to secure full protection to combination no-key-hole bank locks. My single arbor I don't think I made any claim on at that time, but used it for the express purpose of binding the series of plates together. This

was also a conical drill-proof bolt, made of iron and steel. Our modes of fastening the above-described arbors were in different ways. Some we made conical, at the smaller end were made soft, so that we could rivet them down into a counter-sunk plate; others we cut a thread upon at the small end of the arbor or drill-proof bolt, which was done, and, when fitted up, the conical-shaped arbor or bolt was tempered; others were made with a thread cut upon the end of them, designed for a nut, which was designed to be used on the smaller end of them to fasten them more securely, so that they could not be withdrawn from the outside. The conical-shaped arbor, with the thread cut upon the arbor, was designed to be screwed into the inner plate of a series of plates, and then a key-seat cut in each of the threads of the plate and of the arbor, so that keys could be driven in to prevent their being unscrewed and withdrawn from the outside, thereby making them secure against the drill or the use of the sledge-hammer or other tools for forcing them in, being of a conical shape, or from removing any of the series of plates through which they passed."

It is apparent from this testimony that the appellant regarded the double conical-shaped arbor or plug, that is, the cored conical block, and the single conical-shaped arbor or plug, as being the same invention. He was endeavoring to carry back to 1858 or 1859 the invention covered by claim 3 of his patent of 1867. The only difference he makes between the double and the single arbor is that the former had a core removed from it. The latter was solid. Both, he says, were drill-proof, and had the same further design or object, namely, to secure together a series of plates in safes. He also says, that in 1859 or 1860 he made burglar-proof safes of a series of plates composed of iron and steel joined together, using in them these single conical bolts or arbors, for the express purpose of more securely fastening the plates together. He then describes the cutting of a thread upon the arbor and one of the plates to screw the arbor into the inner plate, and cutting a key-seat in the two threads, and putting in a key to prevent the arbor from being unscrewed from the outside. All this describes exactly what is covered by claim 3 of the patent sued on.

In his testimony in the present suit the appellant states that

he made three safes between 1859 and 1864 which were burglar-proof, and had conical bolts for fastening together the different plates of metal. One of them had the double conical bolt and no single bolt, and was sold to a firm in Dayton, Ohio. One was made in 1858 or 1859, to be exhibited at a fair in Ohio, and was sold to a banker in Lafayette, Indiana. It had the single drill-proof conical arbors in the doors. The third one was made to be exhibited at a fair held in 1860, and was sold to the treasurer of Loraine County, Ohio. It had a few of the single conical arbors. It does not distinctly appear that the single conical bolts in the Lafayette and Loraine County safes had screw-threads cut on them, but the appellant testifies in this case that the double arbor of his patent of 1860 had a screw-thread cut upon it running through one or more of the inner plates, for the purpose of holding it.

It clearly appears, from the testimony of the appellant himself, that the idea of making a claim to the invention covered by claim 3 of the patent sued on arose from the introduction into safes, in 1866 or early in 1867, of plates of steel and iron welded together. This enabled the value of the screw-threaded conical bolt to be more fully developed, because the screw-thread could be made more effective the whole length of the bolt. But the whole invention existed in the bolt of the patent of 1860. There was no invention in adding to the solid conical bolt the screw-thread of the cored conical bolt.

Moreover, the use and sale of the solid conical bolts in the Lafayette and Loraine County safes, even though those bolts had no screw-threads on them, constituted a use and sale of the invention covered by claim 3 of the patent in suit. The application for that patent was made in March, 1867, and the patent was granted under the provisions of the act of July 4, 1836, c. 357, and of the act of March 3, 1839, c. 88. Within the meaning of sects. 7 and 15 of the act of 1836, as modified by sect. 7 of the act of 1839, the invention covered by claim 3 of the patent in suit was in use and on sale more than two years before the appellant applied for that patent, and such use and sale were, also, with the consent and allowance of the appellant, and the use was a public use. It is contended that the safes were experimental, and that the use was a use for

experiment. But we are of opinion that this was not so, and that the case falls within the principle laid down by this court in *Coffin* v. *Ogden*, 18 Wall. 120. The invention was complete in those safes. It was capable of producing the results sought to be accomplished, though not as thoroughly as with the use of welded steel and iron plates. The construction and arrangement and purpose and mode of operation and use of the bolts in the safes were necessarily known to the workmen who put them in. They were, it is true, hidden from view, after the safes were completed, and it required a destruction of the safes to bring them into view. But this was no concealment of them or use of them in secret. They had no more concealment than was inseparable from any legitimate use of them. As to the use being experimental, it is not shown that any attempt was made to see if the plates of the safes could be stripped off, and thus to prove whether or not the conical bolts were efficient. The safes were sold, and, apparently, no experiment and no experimental use were thought to be necessary. The idea of a use for experiment was an afterthought. An invention of the kind might be in use and no burglarious attempt be ever made to enter the safe, and it might be said that the use of the invention was always experimental until the burglarious attempt should be made, and so the use would never be other than experimental. But it is apparent that there was no experimental use in this case, either intended or actual. The foregoing views, which are controlling to show that claim 8 of the patent in suit cannot be sustained, are in accordance with those announced in *Egbert* v. *Lippmann*, 104 U. S. 333.

Decree affirmed.

GREEN BAY AND MINNESOTA RAILROAD COMPANY *v.* UNION STEAMBOAT COMPANY.

A railroad corporation, whose railroad extends across the State of Wisconsin from Lake Michigan to the Mississippi River, and which is authorized, by its charter, to make "such contracts with any other person or corporation whatsoever as the management of its railroad and the convenience and interest of the corporation and the conduct of its affairs may in the judgment of its directors require;" and, by general laws, to make such contracts with any railroad company, whose road terminates on the eastern shore of Lake Michigan, "as will enable them to run their roads in connection with each other in such manner as they shall deem most beneficial to their interest," and "to build, construct, and run, as part of its corporate property, such number of steamboats or vessels as they may deem necessary to facilitate the business operations of such company or companies;" and also "to accept from any other State or Territory of the United States, and use, any powers or privileges applicable to the carrying of persons and property by railway or steamboat in said State or Territory;" has the power, for the purpose of carrying passengers and freight in connection with its own railroad and business, to enter into an agreement with the proprietors of steamboats running, by way of the Great Lakes, between its eastern terminus and Buffalo in the State of New York, by which it guarantees that the gross earnings of each boat for two years shall amount to a certain sum.

ERROR to the Circuit Court of the United States for the Western District of Wisconsin.

The case is stated in the opinion of the court.

Mr. Walter C. Larned for the plaintiff in error.

Mr. Francis J. Lamb for the defendant in error.

MR. JUSTICE GRAY delivered the opinion of the court.

This is an action brought by the Union Steamboat Company, a corporation established by the laws of the State of New York at Buffalo in that State, against the Green Bay and Minnesota Railroad Company, a corporation established by the laws of the State of Wisconsin, and having its principal place of business in this State.

The declaration alleges that the defendant was chartered in 1866, and was organized to construct and operate a railroad across the State of Wisconsin east and west from the city of Green Bay to the Mississippi River, and its road was built and actually opened for business in December, 1873; that "it became important for said defendant to make arrangements, in

regard to the business of carrying passengers and freight carried eastwardly over its road and destined for points east of said city of Green Bay and out of the State, for their transportation east, as well as to secure business of carrying passengers and freight arriving at or being moved west by way of the defendant's route and railway;" and on the 9th of September, 1873, the plaintiff and defendant entered into a contract under seal, whereby, in consideration that the plaintiff would, during the season of navigation in 1876 and in 1877, run between Buffalo and Green Bay, by the way of the Great Lakes, and touching at intermediate ports, two steam propellers, then belonging to the plaintiff, for the purpose of carrying passengers and freight to and from Green Bay, in connection with the defendant's railway and business and docks at that place, the defendant duly undertook and guaranteed to the plaintiff that the gross earnings of each propeller in such business should be for each of the two years the sum of $45,000 at least, and that, if it should be less, the defendant would pay the difference to the plaintiff on or before the first of January next succeeding the close of navigation in each year.

The plaintiff further alleges that it duly put the propellers on the route and kept them running thereon, in connection with the defendant's business and in accordance with the contract, during the seasons of 1876 and 1877, and in all respects duly performed all the conditions of the contract on its part; that the gross earnings of each propeller for each season fell short of the amount guaranteed by a certain sum named, which thereupon became due and payable to the plaintiff from the defendant, according to the contract, on the first of January following; and that the two corporations were duly authorized and empowered by their respective charters and the laws of Wisconsin to make the contract.

The answer denies that the defendant was so empowered, and avers that it has no information or knowledge sufficient to form a belief as to whether the plaintiff was so empowered; admits the making of the contract stated in the declaration, and sets forth other provisions of that contract, with which it alleges that the plaintiff had not complied. The plaintiff filed a replication denying the allegations of the answer. Upon a

trial in June, 1878, a verdict was returned for the plaintiff for $78,876.13, and judgment rendered thereon, and the defendant sued out this writ of error.

No bill of exceptions having been seasonably tendered, the only question presented by the record is whether, under the general laws of the State of Wisconsin, and the defendant's charter, which by those laws, as existing at the times of the granting of the charter and of the trial; Revised Statutes of 1858, c. 5, sect. 2; was declared to be a public act, the contract sued on, as set forth in the declaration and admitted in the answer, is *ultra vires* of the defendant corporation.

The general doctrine upon this subject is now well settled. The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation. But whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited. *Thomas* v. *Railroad Co.*, 101 U. S. 71; *Attorney-General* v. *Great Eastern Railway Co.*, 5 App. Cas. 473; *Davis* v. *Old Colony Railroad Co.*, 131 Mass. 258.

The railroad of this corporation extends across the State of Wisconsin from its eastern boundary on Lake Michigan to the Mississippi River; and its charter empowers the directors to make such agreements with any person or corporation whatsoever "as the construction of their railroad or its management and the convenience and interest of the company and the conduct of its affairs may in their judgment require." Private Laws of Wisconsin 1866, c. 540, sect. 7. It was within the powers of the corporation, as incidental to its own proper business, to agree to transport as a carrier, over connecting railroad and steamboat lines, passengers and freight intrusted to it for carriage over its own line. *Railway Company* v. *McCarthy*, 96 U. S. 258. The general laws of Wisconsin, in force at the time of the grant of this charter, authorize any railroad company in this State to make such contracts with any railroad company, whose road terminates on the eastern shore of Lake Michigan within the State of Michigan, "as will enable said companies

to run their roads in connection with each other in such manner as they shall deem most beneficial to their interest," and "to build, construct, and run, as a part of their corporate property, such number of steamboats or vessels as they may deem necessary to facilitate the business operations of such company or companies." General Laws of Wisconsin 1853, c. 76. And by the general railroad act of 1872, "any railroad company, heretofore or hereafter incorporated by or under the laws of this State, may exercise all its rights, franchises, and privileges in any other State or Territory of the United States, under and subject to the laws of the State or Territory where it may exercise, or attempt to exercise, the same, and may accept from any other State or Territory, and use, any additional or other powers or privileges applicable to the carrying of persons and property by railway or steamboat in said State or Territory, or otherwise applicable to the doings of said company in said State or Territory." General Laws of Wisconsin 1872, c. 109, sect. 51.

These statutes show that the legislature of Wisconsin, recognizing the fact that, from the geographical situation of the State, the railroads which traverse it from east to west form part of a line of transportation extending across the continent, intended to confer upon the corporations owning such railroads very large powers of contracting with other corporations owning railroads or steamboats, whose course includes connecting parts of the same great line of transportation.

To build and run, as part of the defendant's corporate property, such number of steamboats on Lake Michigan as it might deem necessary to facilitate its business, would be within the power expressly conferred by the statute of 1853; and we are of opinion that, taking into consideration all the statutes above quoted, it was equally within its corporate powers to hire, either by the trip or by the season, steamboats belonging to others, running from its eastern terminus along the Great Lakes eastward; or to employ such steamboats to carry passengers and freight, in connection with its own railroad and business, under an agreement by which it guaranteed to the proprietors of the boats that their gross earnings for the season should not fall below a certain sum.

There is therefore nothing in the record before us to show that the agreement sued on was beyond the corporate powers of this railroad company.

Judgment affirmed.

MYRICK v. MICHIGAN CENTRAL RAILROAD COMPANY.

1. In the absence of a special contract, a railroad company, by receiving cattle for transportation over its own line and other lines therewith connected, is only bound to carry the cattle over its own line, and deliver them safely to the next connecting carrier.
2. A contract whereby the liability of the company is sought to be extended beyond such carriage and delivery will not be inferred from loose and doubtful expressions, but must be established by clear and satisfactory evidence. Taking a through fare on the receipt of the cattle does not establish such liability.
3. The receipt of the company, *post*, p. 103, does not of itself constitute such contract. The circumstances under which it was given should have been submitted to the jury, to determine whether in fact a through contract was made.
4. In passing upon the rights of the parties, this court will not be controlled by the judicial decisions of the State where the contract of carriage was made.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This is an action for breach of two alleged contracts of the Michigan Central Railroad Company with the plaintiff, Paris Myrick, each to carry for him two hundred and two head of cattle from Chicago to Philadelphia, and there deliver them to his order. It arises out of these facts: Myrick was in 1877 engaged, at Chicago, in the business of buying cattle, sometimes on his own account and sometimes for others, and forwarding them by railway to Philadelphia. The company is a corporation created by the State of Michigan, and its line extends from Chicago to Detroit, where it connects with the Great Western Railroad, which, by its connections, leads to Philadelphia.

In November, 1877, Myrick purchased two lots of cattle, each consisting of two hundred and two head, and shipped them over the road of the company. One of the purchases

and shipments was made on the 7th and the other on the 14th of the month. It will suffice to give the particulars of the first of these transactions, as they were identical in all respects, except in the amount of the draft negotiated and the weight of the cattle.

On the shipment of the cattle Myrick took from the company a receipt, as follows: —

"MICHIGAN CENTRAL RAILROAD COMPANY,
CHICAGO STATION, Nov. 7th, 1877.

"Received from Paris Myrick, in apparent good order, consigned order Paris Myrick (notify J. and W. Blaker, Philadelphia, Pa.):

ARTICLES.	WEIGHT OR MEASURE.
Two hundred and two (202) cattle	240,000

"Advance charges, $12.00. Marked and described as above (contents and value otherwise unknown) for transportation by the Michigan Central Railroad Company to the warehouse at

"WM. GEAGAN, *Agent.*"

On the margin of the receipt was the following: —

"This company will not hold itself responsible for the accuracy of these weights as between buyer and seller, the approximate weight having been ascertained by track-scales, which are sufficiently accurate for freighting purposes, but may not be strictly correct as between buyer and seller. This receipt can be exchanged for a through bill of lading.

"NOTICE. — See rules of transportation on the back hereof. Use separate receipts for each consignment."

On the back of the receipt the rules were printed, one of which, the eleventh, was as follows: —

"Goods or property consigned to any place off the company's line of road, or to any point or place beyond the termini, will be sent forward by a carrier or freightman, when there are such, in the usual manner, the company acting, for the purpose of delivery to such carrier, as the agent of the consignor or consignee, and not as carrier. The company will not be liable or responsible for any

loss, damage, or injury to the property after the same shall have been sent from any warehouse or station of the company."

On the day this receipt was obtained, Myrick drew and delivered to the Commercial National Bank, at Chicago, a draft, of which the following is a copy: —

"$12,287.57.] CHICAGO, Nov. 7, 1877.

"Pay to the order of Geo. L. Otis, cashier, twelve thousand two hundred and eighty-seven $\frac{57}{100}$ dollars, value received, and charge the same to account of PARIS MYRICK.

"To J. and W. BLAKER, Newtown, Pa."

As security for its payment Myrick indorsed the receipt obtained from the railroad company and delivered it, with the draft, to the bank, which thereupon gave him the money for it.

The cattle were carried on the road of the Michigan Central to Detroit, and thence over the road of the Great Western Railroad Company to Buffalo, and thence over the roads of other companies to Philadelphia, the last of which was the road of the North Pennsylvania Railroad Company. They arrived in Philadelphia in about four days after their shipment, where, according to the uniform custom in the course of business of the railroad company, they were turned over to the Drove-Yard Company, which was formed for the purpose of receiving cattle arriving there, taking care of them, and delivering them to their owners or consignees. This company notified the Blakers of the arrival of the cattle, and delivered them to those parties without the production of the carrier's receipt transferred by Myrick to the Commercial National Bank. The Blakers paid the expense of the transportation, took possession of the cattle, sold them, and appropriated the proceeds. The lot shipped on the 14th of November were delivered in like manner to the Blakers by the Drove-Yard Company without the production of the carrier's receipt, given to the bank, and were in like manner disposed of. Soon afterwards the Blakers failed, and the two drafts on them, one made upon the shipment of November 7 and the other on the shipment of November 14, were not paid. Hence the present action for the value of the cattle thus lost to the bank, Myrick suing for its use.

It appeared on the trial that Myrick had made previous

shipments of cattle from Chicago to Philadelphia and taken similar receipts from the Michigan Central Railroad Company; that the cattle shipped had always been delivered by the Pennsylvania Company, at Philadelphia, to the Drove-Yard Company there, and by that company delivered to the Blakers without the production of the carrier's receipt or any bill of lading; that the Blakers were dealers in cattle and had particular pens in the yards assigned to them; that the cattle of the shipments of November 7 and November 14 were, on their arrival, placed by the superintendent of the drove-yards in those pens and were sold by the Blakers on the following day, and that the carrier's receipt was not called for either by the railroad or the stock-yard company. It also appeared on the trial that Myrick bought the cattle for the Blakers, and that a person employed by them accompanied the cattle from Chicago until their delivery at the drove-yard at Philadelphia; that the through rate from Chicago to Philadelphia on the cattle was fifty-eight cents per hundred; that notice of this rate was posted in the station of the defendant company at Chicago, and that it was not the custom of the railroad company at Philadelphia to look to the consignee for freight, but collected it from the Drove-Yard Company.

The court was requested to give to the jury various instructions, one of which, though presented under many forms, amounts substantially to this: That as the road of the Michigan Central Railroad Company terminates at Detroit, the company was not bound, in the absence of special contract, to transport the cattle beyond such termination, and that the receipt of freight for a point beyond and an agreement for a through fare did not of themselves establish such a contract.

The court refused to give this instruction, or any embodying the principle which it expresses. On the contrary, it instructed the jury that the receipt, termed "bill of lading," under the circumstances in which it was made, was a through contract whereby the defendant agreed to transport the cattle named in it from Chicago to Philadelphia, and there deliver them to the order of Paris Myrick, and to notify the Blakers of their arrival; that this was the undertaking on the part of the defendant company with the plaintiff Myrick, and with any

assignee or holder of the contract. The facts attending the transaction not being disputed, there could be only one result from this instruction, — a recovery by the plaintiff. From the judgment entered thereon the case was brought to this court for review.

Mr. George F. Edmunds and *Mr. Andrew L. Osborn* for the plaintiff in error.

Mr. Walter Cranston Larned and *Mr. John N. Jewett* for the defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court, and, after stating the case as above, proceeded as follows: —

The principal question presented by the instruction requested by the defendant has been elaborately considered and adjudged by this court. It is only necessary, therefore, to state the conclusion reached.

A railroad company is a carrier of goods for the public, and, as such, is bound to carry safely whatever goods are intrusted to it for transportation, within the course of its business, to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such line, — the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it. This is the doctrine of this court, although a different rule of liability is adopted in England and in some of the States. As was said in *Railroad Company* v. *Manufacturing Company*, "It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country; but the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction." 16 Wall. 318, 324.

This doctrine was approved in the subsequent case of *Railroad Company* v. *Pratt*, although the contract there was to carry through the whole route. 22 Wall. 123. Such a contract may, of course, be made with any one of different connecting lines. There is no objection in law to a contract of the kind, with its attendant liabilities. See also *Insurance Company* v. *Railroad Company*, 104 U. S. 146.

The general doctrine, then, as to transportation by connecting lines, approved by this court, and also by a majority of the State courts, amounts to this: that each road, confining itself to its common-law liability, is only bound, in the absence of a special contract, to safely carry over its own route and safely to deliver to the next connecting carrier, but that any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence. Although a railroad company is not a common carrier of live animals in the same sense that it is a carrier of goods, its responsibilities being in many respects different, yet when it undertakes generally to carry such freight it assumes, under similar conditions, the same obligations, so far as the route is concerned over which the freight is to be carried.

In the present case the court below held that by its receipt, construed in the light of the circumstances under which it was given, the Michigan Central Railroad Company assumed the responsibility of transporting the cattle over the whole route from Chicago to Philadelphia. It did not submit the receipt with evidence of the attendant circumstances to the jury to determine whether such a through contract was made. It ruled that the receipt itself constituted such a contract. In this respect it erred. The receipt does not, on its face, import any bargain to carry the freight through. It does not say that the freight is to be transported to Philadelphia or that it was received for transportation there. It only says that it is *consigned* to the order of Paris Myrick, and that the Blakers at Philadelphia are to be notified. And, after the description of the property, it adds: "Marked and described as above (con-

tents and value otherwise unknown) for transportation by the Michigan Central Railroad Company to the warehouse at ——," leaving the place blank. This blank may have been intended for the insertion of some place on the road of the company, or at its termination. It cannot be assumed by the court, in the absence of evidence on the point, that it was intended for the place of the final destination of the cattle. On the margin of the receipt is the following: "NOTICE. — See rules of transportation on the back hereof." And among the rules is one declaring that goods consigned to any place off the company's line, or beyond it, would be sent forward by a carrier or freightman, when there are such, in the usual manner, the company acting for that purpose as the agent of the consignor or consignee, and not as carrier; and that the company would not be responsible for any loss, damage, or injury to the property after the same shall have been sent from its warehouse or station. Though this rule, brought to the knowledge of the shipper, might not limit the liability imposed by a specific through contract, yet it would tend to rebut any inference of such a contract from the receipt of goods marked for a place beyond the road of the company.

The doctrine invoked by the plaintiff's counsel against the limitation by contract of the common-law responsibility of carriers has no application. There is, as already stated, no common-law responsibility devolving upon any carrier to transport goods over other than its own lines, and the laws of Illinois restricting the right to limit such responsibility do not, therefore, touch the case. Nor was the common-law liability of the defendant corporation enlarged by the fact that a notice of the charges for through transportation was posted in the defendant's station-house at Chicago. Such notices are usually found in stations on lines which connect with other lines, and they furnish important information to shippers, who naturally desire to know what the charges are for through freight as well as for those over a single line. It would be unfortunate if this information could not be given by a public notice in the station of a company without subjecting that company, if freight is taken by it, to responsibility for the manner in which it is carried on intermediate and connecting lines to the end of the route.

Nor was the liability of the company affected by the fact that the notice on the margin of the receipt stated that the ticket given might be "exchanged for a through bill of lading." It would seem to indicate that the receipt was not deemed of itself to constitute a through contract. The through bill of lading may also have contained a limitation as to the extent of the route over which the company would undertake to carry the cattle. Besides, if weight is to be given to this notice as characterizing the contract made, it must be taken with the rule to which it also calls attention, that the company assumed responsibility only for transportation over its own line.

It follows from the views expressed that the court below erred in its charge that the ticket or bill of lading was a through contract, whereby the defendant company agreed to transfer the cattle to Philadelphia, and safely deliver them there to the order of Myrick.

Our attention has been called to some decisions of the Supreme Court of Illinois, which would seem to hold that a railroad company which receives goods to carry, marked for a particular destination, though beyond its own line, is *prima facie* bound to carry them to that place and deliver them there; and that an agreement to that effect is implied by the reception of goods thus marked. *Illinois Central Railroad Co.* v. *Frankenberg*, 54 Ill. 88; *Illinois Central Railroad Co.* v. *Johnson*, 34 id. 389.

Assuming that such is the purport of the decisions, they are not binding upon us. What constitutes a contract of carriage is not a question of local law, upon which the decision of a State court must control. It is a matter of general law, upon which this court will exercise its own judgment. *Chicago City* v. *Robbins*, 2 Black, 418; *Railroad Company* v. *National Bank*, 102 U. S. 14; *Hough* v. *Railway Company*, 100 id. 213.

If the doctrine of the Supreme Court of Illinois, as to what constitutes a contract of carriage over connecting lines of roads, is sound, it ought to govern, not only in Illinois, but in other States; and yet the tribunals of other States, and a majority of them, hold the reverse of the Illinois court, and coincide with the views of this court. Such is the case in Massachusetts.

Nutting v. *Connecticut River Railroad Co.*, 1 Gray (Mass.), 502; *Burroughs* v. *Norwich & Worcester Railroad Co.*, 100 Mass. 26. If we are to follow on this subject the ruling of the State courts, we should be obliged to give a different interpretation to the same act — the reception of goods marked for a place beyond the road of the company — in different States, holding it to imply one thing in Illinois and another in Massachusetts.

The judgment must be reversed, and the case remanded for a new trial; and it is

So ordered.

BUSH v. KENTUCKY.

1. Where the Circuit Court quashes an indictment, found against the prisoner in a State court, wherefrom the cause was on his petition removed, it has no jurisdiction to proceed against him for the crime against the State wherewith he was charged.
2. Where the highest court of the State had declared to be unconstitutional her statute whereby, because of their race and color, citizens of African descent were excluded from grand and petit juries, and it had further decided that the officer summoning or selecting jurors must disregard race or color, a person of that descent against whom a criminal prosecution was subsequently instituted in the State court has no just ground for declaring, in advance of a trial, that he was denied, or that in the State tribunals he cannot enforce, the equal civil rights secured to him as a citizen by the Constitution or the statutes of the United States. The case was not, therefore, removable to the Circuit Court, nor should the panel of petit jurors be set aside simply on the ground that it consisted wholly of white persons.
3. Where pursuant to such a statute, and before its unconstitutionality was so declared, the grand jurors were selected who found the indictment against the prisoner, a person of that descent, the court of original jurisdiction should, on his motion, set aside the indictment.

ERROR to the Court of Appeals of the State of Kentucky.

The case is stated in the opinion of the court.

Mr. Llewellen P. Tarlton for the plaintiff in error.

Mr. William C. P. Breckenridge and *Mr. Joseph D. Hunt* for the defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This court shares the regret expressed by counsel that the record is in some respects so meagre, and in other respects so

confused, that it is impossible to ascertain what facts were before the inferior State court when it passed certain orders that are commented upon in argument. Some of those orders refer to affidavits and other documents that are not made in any form a part of the record. The difficulties in our way have been, in part, removed by the frank concessions of counsel on both sides, and we cheerfully acknowledge the aid we have received from them in our search through the record for the substantial questions to be determined. We may also add, that our embarrassment has been increased by the consideration that the case is one of no small moment, involving, as it does, on the one hand, the life of a citizen, and on the other, the question whether the judicial tribunals of a State have denied to a prisoner rights guaranteed by the Constitution of the United States. Whether the record before us shows such a denial we will now proceed to inquire.

John Bush, a citizen of African descent, was indicted in 1879 in the Circuit Court for Fayette County, Kentucky, for murder. Upon his first trial the jury, as was stated by counsel, being unable to agree, were discharged. At the next trial he was found guilty, and condemned to suffer death. Upon appeal to the Court of Appeals that judgment was reversed and a new trial ordered for errors committed by the court of original jurisdiction: *first*, in neglecting to instruct as to involuntary manslaughter, as distinguished from murder, the evidence being such as to authorize the jury to find the accused guilty of either offence; *second*, in defining the term "malice;" *third*, in failing properly to instruct whether the death of the deceased was necessarily or probably caused by the wound or ensued from scarlet fever negligently communicated by her physician. *Bush* v. *Commonwealth*, 78 Ky. 268.

Upon the return of the case the accused, as we infer from the record, filed a petition for its removal to the Circuit Court of the United States. That petition, we are informed by counsel, was filed May 24, 1880. It, however, is not in the record. We assume that it was based upon sect. 641 of the Revised Statutes, which authorizes, in general, the removal into such court of any criminal prosecution, commenced in a State court, for any cause whatever, against any person who is denied or can-

not enforce in the judicial tribunals of the State, or in the part of the State where the prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within their jurisdiction. The record, however, does state that copies of all the proceedings in the inferior State court were filed by the accused in the Federal court, before which he was brought upon a writ of *habeas corpus* addressed to the jailer having him in custody.

On the 19th of October, 1880, the accused by his counsel moved in the Federal court that the trial proceed. That motion was denied, and the response by the jailer to the writ of *habeas corpus* was adjudged to be insufficient. The reasons which controlled this action are set forth in the following order: —

"And it appearing to the court from the transcript of the record heretofore filed that the indictment herein was found by a grand jury, summoned under and in accordance with the provisions of section 1, chapter 62, General Statutes of Kentucky, which excludes all other than white citizens from being summoned, or serving thereon, the court is of opinion that said law is a violation of the 14th amendment to the Constitution of the United States, and orders said indictment quashed.

"The marshal of the court is ordered to return the said John Bush to Lexington, Kentucky, as speedily as possible, and there release him. He will, however, before setting him at liberty, notify the Commonwealth's attorney, or, in his absence, the county attorney, or, in his absence, the county judge. This notice shall be in writing, stating the time and place of his release, and he will report his action to this court.

"The defendant excepts to so much of this order as requires his return to Lexington, Kentucky."

The accused was subsequently arrested by the State authorities and a new indictment returned for the same offence. At the term of the court held on the 6th of December, 1880, he tendered an affidavit, stating that "on the fourth day of February, 1879, the grand jury of Fayette County returned into this court an indictment charging him with the same offence, and upon the same statement of facts charged herein; that he, as he had a right to do under the 641st section of the Revised

Statutes of the United States, filed in this court his petition for a transfer of his case to the United States Circuit Court for this district for trial under said indictment; that the prayer of his petition was granted by said Circuit Court, on which, under said statute, all further proceedings were to cease forever; that the jurisdiction of said United States Circuit Court, to which, under said statute, this cause was removed for the trial of this offence, is superior to and in exclusion of that of this court, and, that court having taken jurisdiction, this court has no jurisdiction to try the same." Copies of the orders of the United States Circuit Court were made part of that affidavit. The court refused its permission to file such affidavit, and to that ruling the accused excepted. The case was then continued to the succeeding February Term, when a special *venire* issued, commanding the sheriff to summon "one hundred and fifty good and lawful jurors from whom to select a jury for the trial of this [Bush's] case." But at that term the prosecution was continued, and on May 16, 1881, the case being again called for trial, the sheriff was ordered to summon "a panel of seventy-five additional jurors from whom to select a jury for the trial of this case, and in executing this order he will proceed in his selections without regard to race, color, or previous condition of servitude."

We next find in the record of proceedings in the State court, under date of May 18, 1881, this order: —

"And afterwards, at a term of said court held for said circuit, May 18, 1881, the Commonwealth came, by attorney, and the defendant appeared in custody. The defendant moves the court *to set aside the indictment* herein against him, because there was a substantial error committed to his prejudice in the selection and formation of the grand jury which found said indictment, in that the said grand jury was selected and formed in violation of the Constitution of the United States, and therefore is unconstitutional, null, and void, because all citizens of the United States and State of Kentucky, and resident in Fayette County, who were not of the class known as white, though eligible for such service, were excluded from the lists from which said grand jury was selected, and thereby the rights, privileges, and immunities of all such citizens so residing, who did not belong to the class known as white, and of the defend-

ant, who is not white, although a citizen of the United States and of Fayette County, Kentucky, were abridged because he and they are not white, and *on account of his and their race and color*, contrary to the Constitution of the United States and the laws in such cases made and provided; which was overruled by the court, and defendant excepts."

The accused then moved to set aside the panel of petit jurors, upon grounds set forth in the following order entered on the same day: —

"The defendant now moves the court *to set aside the panel of petit jurors* selected and summoned to try him herein, because there was a substantial error committed to his prejudice, in that said jurors were not summoned as required by law, in that all citizens of the United States and State of Kentucky, resident in Fayette County, of the African race, of which there are very many eligible and qualified to serve as jurors in Fayette County, and to which race this defendant belongs, were excluded and not summoned by the officers whose duty it was to select and summon said panel to serve on said panel from which the jury to try defendant was to be selected, but only such citizens eligible and qualified which belonged to the class known as white were selected and summoned by such officers. Defendant filed a *petition for the transfer of this case to the Circuit Court of the United States for Kentucky*, which motion was overruled, and defendant excepts."

The trial proceeded, and the jury returned a verdict of guilty of murder; and, under the power vested in them by the laws of Kentucky, fixed the punishment at death. A judgment having been rendered accordingly, a motion for a new trial was made and overruled. Upon appeal to the Court of Appeals the judgment was affirmed.

This statement of facts is quite sufficient to indicate the grounds upon which we rest our determination of such of the questions raised by the assignment of errors as we deem it necessary to consider.

1. The proposition in behalf of the accused to which we will first direct our attention is, that the removal of the prosecution under the first indictment into the Circuit Court of the United States — although the indictment was there quashed — operated to divest the State court of all jurisdiction thereafter,

under any circumstances whatever, to try him for the crime charged.

Such a construction of sect. 641 is wholly inadmissible. The prosecution against Bush could only have been commenced in the judicial tribunals of Kentucky. The crime for which he was indicted, being an offence against the laws of that State, not against those of the United States, was not originally cognizable in the courts of the Union. The removal of the first indictment into the Federal court was competent only because at that time he was denied, by the statutes of Kentucky, rights secured to him by the Constitution and laws of the United States. And when the Federal court in that mode acquired jurisdiction to proceed, as if the prosecution had been there commenced, its authority was limited to the trial of the indictment so removed. That court had, pending the prosecution therein, the same power over the indictment that the State court could have exercised had there been no removal. When, therefore, the Federal court, in the exercise of the discretion which it unquestionably had, quashed the indictment, it was without jurisdiction further to proceed against the defendant for the crime. He could not have been held for indictment by a grand jury in that court, for the obvious reason already suggested that his offence was not one against the United States, but against Kentucky. It was for the authorities of the latter alone to determine whether he should be again indicted, or the prosecution be abandoned.

It follows that there was no error in the order directing the prisoner to be returned to the county in which he was originally indicted. That course was due to the State to the end that its authorities, being duly notified, might take such further action in the premises as they should deem expedient. *Coleman* v. *Tennessee*, 97 U. S. 509; *United States* v. *McBratney*, 104 id. 621; *United States* v. *Cisna*, 1 McLean, 254.

2. But it is contended, upon behalf of the accused, that his petition for removal, filed after the second indictment was returned, should have been granted, and that the State court could not thereafter rightfully proceed. The petition referred to is doubtless the one described in the order of May 18, 1881. But the record contains no copy of it; nor did it appear in the

record sent to the Court of Appeals of Kentucky. The same question having been raised in that court, it replied properly that "an inspection of the petition is essential to determine whether it contained allegations sufficient to authorize a transfer, and, in its absence, it must be presumed that it was defective in the allegation of jurisdictional facts, and, therefore, that the court below did right to disregard it."

But there is another and distinct ground upon which that petition, assuming that it was based upon sect. 641, was properly disregarded by the inferior State court. The Court of Appeals of Kentucky, in *Commonwealth* v. *Johnson*, 78 Ky. 509, decided June 29, 1880 (and hereafter more fully referred to), had declared that the statutes of Kentucky excluding from a grand or a petit jury citizens of African descent because of their race or color, was unconstitutional, and that thereafter every officer charged with the duty of selecting or summoning jurors must so act without regard to race or color. That decision was binding as well upon the inferior courts of Kentucky as upon all of its officers connected with the administration of justice. After that decision, so long as it was unmodified, it could not have been properly said in advance of a trial that the defendant in a criminal prosecution was denied or could not enforce in the judicial tribunals of Kentucky the rights secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within their jurisdiction. The last indictment was consequently not removable into the Federal court for trial under sect. 641 at any time after the decision in *Commonwealth* v. *Johnson* had been pronounced. This point was distinctly ruled in *Neal* v. *Delaware*, and is substantially covered by the decision in *Virginia* v. *Rives*. If any right, privilege, or immunity of the accused, secured or guaranteed by the Constitution or laws of the United States, had been denied by a refusal of the State court to set aside either that indictment, or the panel of petit jurors, or by any erroneous ruling in the progress of the trial, his remedy would have been through the revisory power of the highest court of the State, and ultimately through that of this court. *Virginia* v. *Rives*, 100 U. S. 313; *Neal* v. *Delaware*, 103 id. 370.

3. It is also assigned for error that the court of original jurisdiction erred in overruling the motion to set aside the panel of petit jurors. We have seen that the ground of this motion was that the petit jurors were not selected and summoned as required by law, in that all citizens of African descent in the county, very many of whom were eligible and qualified to serve as jurors, were excluded from the panel by the officer charged with the duty of selecting and summoning the petit jurors, and that only white citizens were selected and summoned.

It is sufficient for this assignment to say that the motion was properly overruled, for the reason, amongst others, that the grounds upon which it was rested do not clearly and distinctly show that the officers who selected and summoned the petit jurors excluded from the panel qualified citizens of African descent *because of their race or color*. It may have been true that only white citizens were selected and summoned, yet it would not necessarily follow that the officer had violated the law and the special instruction given by the court "to proceed in his selection without regard to race, color, or previous condition of servitude." There was no legal right in the accused to a jury composed in part of his own race. All that he could rightfully demand was a jury from which his race was not excluded *because of their color*. *Virginia* v. *Rives*, 100 U. S. 313. The allegation that colored citizens were excluded, and that only white citizens were selected, was too vague and indefinite to constitute the basis of an inquiry by the court whether the sheriff had not disobeyed its order by selecting and summoning petit jurors with an intent to discriminate against the race of the accused. This motion was, therefore, properly overruled.

4. But the most important question raised by the assignments of error is that which relates to the overruling of the motion made before the trial to set aside the indictment because found by a grand jury selected and formed upon the basis of excluding therefrom, because of their color, all citizens of the African race resident in Fayette County and eligible for such service.

In several cases heretofore decided in this court we have had

occasion to consider the general question whether the Fourteenth Amendment, and the laws passed by Congress for the enforcement of its provisions, do not prohibit any discrimination, in the selection of grand and petit jurors, against citizens of African descent, because of their race or color.

In *Neal* v. *Delaware*, 103 U. S. 370, we said — commenting upon *Strauder* v. *West Virginia*, *Virginia* v. *Rives*, and *Ex parte Virginia*, 100 id. 303, 313, 339 — that a denial to citizens of African descent, *because of their race*, of the right or privilege accorded to white citizens, of participating as jurors in the administration of justice, is a discrimination against the former inconsistent with the amendment, and within the power of Congress, by appropriate legislation, to prevent; that to compel a colored man to submit to a trial before a jury drawn from a panel from which is excluded, because of their color, every man of his race, however well qualified by education and character to discharge the functions of jurors, is a denial of the equal protection of the laws; and that such exclusion of the black race from juries, because of their color, is not less forbidden by law than would be the exclusion from juries, in the States where the blacks have the majority, of the white race, because of *their* color.

It was also said, in that case, that "the presumption should be indulged, in the first instance, that the State recognizes, as is its plain duty, an amendment of the Federal Constitution, from the time of its adoption, as binding on all of its citizens and every department of its government, and to be enforced within its limits, without reference to any inconsistent provisions in its own Constitution or statutes."

But it was further said: "Had the State, since the adoption of the Fourteenth Amendment, passed any statute in conflict with its provisions, or with the laws enacted for their enforcement, or had its judicial tribunals, by their decisions, repudiated that amendment as a part of the supreme law of the land, or declared the acts passed to enforce its provisions to be inoperative and void, there would have been just ground to hold that there was such a denial, upon its part, of equal civil rights, or such an inability to enforce them in those tribunals, as, under the Constitution and within the meaning

of that section (641, Rev. Stat.), would authorize a removal of the suit or prosecution to the Circuit Court of the United States."

Again, it was declared that a denial upon the part of the officers of the State, charged with duties in that regard, of the right of a colored man "to a selection of grand and petit jurors without discrimination against his race, because of their race, would be a violation of the Constitution and laws of the United States, which the trial court was bound to redress. As said by us in *Virginia* v. *Rives*, 'The court will correct the wrong, will quash the indictment or the panel; or, if not, the error will be corrected in a Superior Court,' and ultimately in this court upon review."

Guided by these principles, we proceed to inquire whether there was anything in the action of the State, by means of legislation or otherwise subsequent to the adoption of the Fourteenth Amendment, that requires us to hold, as matter of law, that in the selection and formation of the grand jury which returned the last indictment there was such a discrimination against the plaintiff in error because of his race, as made it the duty of the court to sustain the motion to set aside that indictment.

By the Revised Statutes of Kentucky, which went into effect on the first day of July, 1852, and were in force when the Fourteenth Amendment became a part of the national Constitution, no one was competent to serve as a petit juror who was not "a free white citizen;" and none except *citizens* could serve on a grand jury. 2 Rev. Stat. Ky. (Stanton's ed.), pp. 75, 77. By the same statutes it was provided that all free white persons born in Kentucky or in any other State of the Union, residing in that State, all free white persons naturalized under the laws of the United States, residing there, and all persons who have obtained a right to citizenship under former laws, and every child, wherever born, whose father or mother was or shall be a citizen of Kentucky at the birth of such child, shall be deemed citizens of that State. 1 id. 238. So that, by the law of Kentucky at the adoption of the Fourteenth Amendment no citizen of the African race was competent to serve as a grand juror.

The Revised Statutes of Kentucky were superseded (certainly as to the selection of grand and petit jurors) by the General Statutes, which were formally enacted as the law of the State, and went into effect on the first day of December, 1873. These — whilst declaring, in conformity with the Fourteenth Amendment, all persons born or naturalized in the United States and subject to the jurisdiction thereof if residing in Kentucky to be citizens of that State — re-enacted the disqualification of colored persons as petit jurors, and also provided that "no person shall be qualified as a grand juryman unless he be a white citizen." Gen. Stat. Ky. 570. And in the new Criminal Code of Practice of Kentucky, which went into effect Jan. 1, 1877, it is expressly provided that "the selecting, summoning, and impanelling of a grand jury shall be as prescribed in the General Statutes." Sect. 101.

It thus appears that the legislature of Kentucky, after the adoption of the Fourteenth Amendment and notwithstanding the explicit declaration therein that "no State shall deny to any person within its jurisdiction the equal protection of the laws," twice expressly enacted that no citizen of the African race should be competent to serve either as a grand or petit juror. And these re-enactments of the prior laws excluding citizens of that race from service on grand or petit juries remained unchanged by legislation in that Commonwealth until the passage of the act approved Jan. 26, 1882, whereby the word "white" was stricken out of the sections of the General Statutes prescribing the qualifications of grand and petit jurymen.

In this connection it is necessary to recur to the case of *Commonwealth* v. *Johnson*, determined, as we have seen, in the Court of Appeals of Kentucky on the 29th of June, 1880. In that case it was held, upon the authority of *Strauder* v. *West Virginia*, 100 U. S. 303 (decided on the first day of March, 1880), that so much of the statute of Kentucky "as excludes all persons other than white men from service on juries is unconstitutional, and that no person can be lawfully excluded from any jury on account of his race or color." The learned court then proceeded: "This question has not been heretofore passed on by this court, and as the duty of select-

ing and summoning juries is devolved upon merely ministerial officers, we ought to assume that, in performing their duties, they obeyed the statute as enacted by the legislature, and that they excluded colored persons from the jury because the statute declares them to be incompetent, and, consequently, that the appellee was deprived by the statute of a right which the Supreme Court holds is secured to him by the Constitution.

"But the word 'white,' as found in our jury laws, being *now* declared to be no part of that law, it will be incumbent on all officers charged with the duty of selecting or summoning jurors, to make their selections without regard to race or color; and when juries are *hereafter* selected and summoned, it ought to be presumed that the officers did their duty, and ignored the statute so far as it is herein held to be unconstitutional, and that they have not excluded any person from the jury on account of his race or color." 78 Ky. 509.

The indictment upon which the plaintiff in error has been tried, convicted, and sentenced to suffer death was returned by a grand jury selected by jury commissioners who were appointed by the State court of original jurisdiction at its May Term, 1880. It was therefore found by grand jurors who were selected prior to the decision in *Commonwealth* v. *Johnson*. The names of the grand jurors so selected were reported to the court at that term as the grand jury for the succeeding term, — at which the indictment upon which Bush was tried was returned. So that the grand jurors who found the indictment were *selected* when statutes of Kentucky, re-enacted after the adoption of the Fourteenth Amendment, expressly restricted jury commissioners in their selection of grand jurors to white citizens. Further, they were selected at a time when, according to the rule announced by the highest court of Kentucky, it should be assumed that the officers charged with the duty of selecting grand jurors obeyed the local statute by excluding from the list, because of their race, all citizens of African descent.

These considerations bring the case within the principles announced in *Neal* v. *Delaware*. The presumption that the State recognized the Fourteenth Amendment from the date of its adoption to be binding on all its citizens and every depart-

ment of its government, and to be enforced within its limits without reference to any inconsistent provisions in its own Constitution and laws, is overthrown by the fact that twice, after the ratification of that amendment, the State enacted laws which in terms excluded citizens of African descent, because of their race, from service on grand and petit juries. It was not until after the grand jurors who returned the indictment against Bush had been *selected* that the highest court of Kentucky, speaking with authority for all the judicial tribunals of that Commonwealth, declared that the local statutes, in so far as they excluded colored citizens from grand and petit juries because of their race, were in conflict with the national Constitution.

But upon this branch of the case the argument by counsel for the Commonwealth of Kentucky is, that the record does not show, by a bill of exceptions or otherwise, that any proof whatever was offered in support of the motion to set aside the indictment; and, consequently, that in disposing of that motion, as presenting simply a question of law arising upon the face of the local statutes, the presumption is that the jury commissioners in their selection, at May Term, 1880, of the Fayette Circuit Court, of grand jurors for the succeeding term, respected the decision in *Strauder* v. *West Virginia* and similar cases, and, therefore, disregarded the statutes of Kentucky. The force of this position would be greatly strengthened if the record furnished any evidence that the court gave to those commissioners such instructions as were given to the sheriff in May, 1881, when that officer was required to select and summon petit jurors for the trial of Bush. We are of opinion that the rule announced by the Court of Appeals in *Commonwealth* v. *Johnson* is consistent with sound reason and public policy; and, in conformity therewith, — in the absence of any evidence that the selection of grand jurors, in May, 1880, was in fact made without discrimination against colored citizens, because of their race, — it should be assumed that the jury commissioners then appointed followed the statutes of Kentucky so far as they restricted the selections of grand jurors to citizens of the white race.

For these reasons it is adjudged that the court of original

jurisdiction erred in overruling the motion to set aside the indictment, and, consequently, that the Court of Appeals of Kentucky erred in affirming its judgment.

The judgment of the Court of Appeals of Kentucky is reversed, and the cause remanded to that court, to be thence remanded to the Fayette Circuit Court, with directions to set aside the indictment.

MR. JUSTICE FIELD adheres to the views expressed by him in his dissenting opinions in *Ex parte Virginia*, 100 U. S. 339, 349, and in *Neal* v. *Delaware*, 103 id. 370, 398; and, therefore, dissents from the judgment in this case.

MR. CHIEF JUSTICE WAITE, with whom concurred MR. JUSTICE GRAY, dissenting.

I am unable to concur in this judgment. In my opinion it is not to be presumed that the courts or the officers of Kentucky neglected or refused to follow the rulings in *Strauder* v. *West Virginia* after the judgment in that case was pronounced by this court. The Court of Appeals promptly recognized the authority of that case, and, in the absence of any proof to the contrary, it seems to me we must assume that the inferior courts also did.

KENDALL *v.* UNITED STATES.

1. In computing the six years after his claim against the United States first accrues within which it may be filed in the Court of Claims, the period must be included when the claimant was unable to sue in that court by reason of the aid he gave to the rebellion.
2. The petition is bad on demurrer when it appears therefrom that the claimant's right of action against the United States is barred by the lapse of time.

APPEAL from the Court of Claims.

The case is stated in the opinion of the court.

Mr. Thomas W. Bartley for the appellant.

The Solicitor-General for the United States.

MR. JUSTICE HARLAN delivered the opinion of the court.

The act of March 3, 1863, c. 92, amending that of Feb. 24, 1855, c. 122, establishing the Court of Claims, declares "that every claim against the United States, cognizable by the Court of Claims," — that is, such as the government permits to be asserted against it by suit in that tribunal, — "shall be forever barred, unless the petition, setting forth a statement of the claim, be filed in the court, or transmitted to it under the provisions of this [that] act, within six years after the claim first accrues." After providing that claims which had accrued six years before its passage shall not be barred if the petition be filed in, or transmitted to, the court within three years after its passage, and that the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in court or transmitted within three years after the disability has ceased, the act proceeds: "But no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively."

The same act also provides that, in order to authorize a judgment in favor of any citizen of the United States, it shall be set forth in the petition that the claimant, and the original and every prior owner thereof, where the claim has been assigned, has at all times borne true allegiance to the government of the United States, and whether a citizen or not, that he has not in any way voluntarily aided, abetted, or given encouragement to the rebellion against the government, which allegations may be traversed by the government; and if on the trial such issue shall be decided against the claimant, his petition shall be dismissed.

The appellant's claim arose on or about the last day of December, 1865. His petition was not filed within six years from that date, and not until Nov. 22, 1872. The government demurred, and the petition was dismissed upon the ground that the claim was barred.

Claimant was engaged in the service of the insurgent government, but he insists that in virtue of the amnesty proclamation

of Dec. 25, 1868, his disabilities were removed, and his rights, privileges, and immunities, under the Constitution, restored. His specific contention is, that within the true meaning of the statute his claim was not cognizable by the Court of Claims, and did not accrue, until he was in such position that he could invoke its jurisdiction. That, it is asserted, was impossible before the promulgation of that proclamation.

We said in *McElrath* v. *United States*, 102 U. S. 426, that the government could not be sued except with its consent, and that it may restrict the jurisdiction of the Court of Claims to certain classes of demands. The acts in question do contain restrictions which that court may not disregard. For instance, where it appears in the case that the claim is not one for which, consistently with the statute, a judgment can be given against the United States, it is the duty of the court to raise the question whether it is done by plea or not. To that class may be referred claims which are declared barred if not asserted within the time limited by the statute. What claims are thus barred? The express words of the statute leave no room for contention. *Every* claim — except those specially enumerated — is forever barred unless asserted within six years from the time it first accrued. And that there might be no misapprehension as to the intention of Congress, the statute, after enumerating the cases to which the limitation of six years should not apply, declares that "no other disability than those enumerated shall prevent any claim from being disbarred." The court cannot superadd to those enumerated, a disability arising from the claimant's inability to truthfully take the required oath. It has no more authority to engraft that disability upon the statute than a disability arising from sickness, surprise, or inevitable accident, which might prevent a claimant from suing within the time prescribed. Appellant's claim, if any he has or had, accrued, within the meaning of the statute, when the government came under a legal obligation to pay the amount thereof. In other words, it accrued against the government when, had the transaction recited in the petition occurred with a citizen, it would have accrued against that citizen. That the claimant was, at that time, or any time prior to Dec. 25, 1868, unable by reason of his connection with the rebellion — a circumstance

for which the United States was in no wise responsible — to comply with the terms upon which the government had consented to be sued in the Court of Claims, is his misfortune, and cannot have the effect of enlarging the time fixed by the statute of limitation. His remedy, if the claim be a valid one, is to apply to the legislative department of the government. The courts cannot, in view of the language of the statute, exclude from computation, on the issue of limitation, the time intervening between the accruing of the claim in 1865 and the promulgation of the amnesty proclamation.

Judgment affirmed.

POTTER *v.* UNITED STATES.

1. The local land-officers are not required to meet and jointly consider the proof of settlement and cultivation offered by claimants under the pre-emption laws.
2. In his accounts with the government, a receiver of public moneys in a land district charged himself with money which he, or, during his absence, his authorized agents, had received as the purchase price of public lands entered pursuant to the pre-emption laws. The United States, on his failure to pay over the money, brought suit on his official bond. *Held*, that neither he nor his sureties can defeat a recovery by setting up irregularities in the proceedings by which the entry of the lands was allowed.

ERROR to the Circuit Court of the United States for the District of Minnesota.

This was an action brought against George F. Potter and his sureties on his official bond as receiver of public moneys in the Pembina land district in the Territory of Dakota. The bond bears date Aug. 3, 1870, and its condition is that he shall "truly and faithfully execute and discharge all the duties of his said office according to law." The declaration alleges that he was appointed such receiver for four years beginning June 7, 1870; that after the execution and delivery of the bond and prior to June 30, 1874, there legally came into his hands, as such receiver, the sum of $8,564.77, which he refused and neglected to account for, or to pay over to the United States.

Only the sureties on the bond answered. Their defence is as follows: "That from and after September 30, 1873, there never was any register at the land-office at Pembina; that there were no legal sales of land or receipts of moneys at said land-office for any purpose during all the time from said 30th of September, to the end of the time that said Potter held the office of receiver of said land-office."

The parties waived a jury, and submitted the issues of fact as well as of law to the court. Upon the trial, the United States offered in evidence certified copies of the accounts rendered by Potter for four quarters, to wit, the quarters ending respectively Sept. 30 and Dec. 31, 1873, and March 31 and June 30, 1874, which showed a balance against him of $8,564.77, which he had not accounted for or paid over.

By way of defence testimony was offered which, as stated by the bill of exceptions, proved that one Brashear, from the summer of 1871 until the expiration of the term of office of Potter, was register of the land-office at Pembina; that from and after Sept. 23, 1873, Brashear was not present at said land-office, but on the day last named "left Pembina and said land-office, and never returned, but continued to hold said office of register during Potter's term of office," which expired in June, 1874; "that before leaving the office he signed a large number of printed blanks, covering all the various business of the register of said land-office, and left them with one William R. Goodfellow, who was a clerk in the custom-house in said Pembina, and had nothing to do with said land-office, except that he was authorized by said Brashear to act for him in his absence; and that all the business of said land-office, as far as the said register was concerned, was done by said Goodfellow with the blanks so signed by said register as aforesaid."

The bill of exceptions further shows that testimony was offered which proved "that the said receiver, George F. Potter, left said Pembina and said land-office on the 8th or 9th of April, 1874, and did not return until the last of June or the beginning of July, 1874, and that no one was in charge of said land-office while said receiver was gone except said Goodfellow; that on the return of said Potter he received no money from said Goodfellow on account of said office, and that he did

receive from his son the sum of $200 or $300, and no more; that Goodfellow took in, during the absence of said Potter, some $1,400 of money belonging to said land-office, and paid the same over to said son of said Potter, from whom it was all stolen, except the $200 or $300 paid over by him to said Potter."

Upon this evidence the sureties on the bond of Potter contended that "they were not liable for any moneys received at said land-office for any business done therein in the absence of either the register or receiver."

The court decided against the contention of the defendants, and rendered judgment against them for the sum of $6,406.30, which included moneys received by Potter after as well as before Sept. 23, 1873. To this ruling and judgment of the court the defendants excepted. The purpose of the writ of error is to obtain a review in this court of the question raised by this exception.

Mr. Charles E. Flandrau for the plaintiff in error.

Mr. Assistant Attorney-General Maury for the United States.

MR. JUSTICE WOODS delivered the opinion of the court, and, after stating the case as above, proceeded as follows: —

The answer does not allege that the moneys for which the court rendered judgment against the defendants were received by Potter after Sept. 23, 1873, and during the absence of Brashear, the register, nor does the bill of exceptions profess to state all the evidence in regard to the absence of Brashear and Potter from their respective offices. Passing by these defects in the record, we shall consider the question presented by the exception of the defendants.

Their first contention is that they are not responsible for any moneys received by Potter, the receiver, during the time that Brashear, the register, was absent from the land-office. The ground of this contention is as follows: The record shows that during Potter's term of office all sales of land were either by pre-emption, or commutation of homesteads. The argument applies only to pre-emption sales. Sect. 2259 of the Revised Statutes prescribes what persons are entitled to pre-emption, and upon what terms the right of pre-emption is

accorded to the settler upon the public lands. Sect. 2263 declares that "prior to any entries being made under and by virtue of the provisions of sect. 2259, proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands lie," &c. The plaintiffs in error contend that these officers constitute a tribunal, and that no business can be done without the presence and action of both. And as Brashear was absent from Sept. 23, 1873, to the close of Potter's term, there could be no legal pre-emptions during that time, and that all moneys paid for pre-emptions before the conditions prescribed by law had been complied with were not payments made to the United States, but unauthorized and unofficial payments made to the receiver, for which his sureties were not liable.

In our judgment this contention has no ground to stand on. There is no expression in the statute which requires the register and receiver to sit at the same time and concurrently pass upon the sufficiency of the proof of settlement and improvement by pre-emptors. If the proof is submitted to the register on one day and he is satisfied, there is nothing in the statute which implies that it may not be lawfully submitted, at some subsequent day, to the receiver for his approval. The oath of the pre-emptor, which is part of the proof required by law, may be taken before either the register or receiver. Sect. 2262. *Lytle* v. *State of Arkansas*, 9 How. 314. They are nowhere required to meet and jointly consider the sufficiency of the proof offered. If both are satisfied, that is all the law requires.

It does not appear in the record that the proof by pre-emptors of the settlement and improvement of the lands for which money was received by Potter during the absence of Brashear had not been made to his satisfaction before he left the land district. If such proof had been made to the satisfaction of Brashear all that was necessary to complete the right of the pre-emptor was the approval of Potter, which was effectually expressed by his receipt of the money.

What the law requires is that the conditions requisite to a pre-emption entry should be shown to have been performed to

the satisfaction of both officers. As it does not appear in the record that the proof was not made to the satisfaction of both officers, it must be presumed that the money received by Potter in the absence of Brashear was justly due the United States and was received by him in his official capacity. We find nothing either in the cases or the statutes cited by the plaintiffs in error which tends to establish a different construction of the law.

But if it be conceded that the statute required the register and receiver to pass concurrently upon the proof of the settlement and improvement before lands could be entered by a pre-emptor, we are, nevertheless, of opinion that the plaintiffs in error are responsible for the moneys received by Potter.

The moneys were received by him as public moneys, for he charged himself with them in his accounts with the government. They were paid as public moneys by pre-emptors as a consideration for title to portions of the public domain. If any objection could be raised to the transfer of title to the pre-emptors, it could be made by the United States only. But the United States makes no objection. On the contrary, all objection is waived by the bringing of this suit by the government to recover the moneys paid by the pre-emptors for their lands. These moneys are, therefore, public moneys. They belong neither to Potter nor the pre-emptors, and must, consequently, be the property of the United States. It was, therefore, his duty as receiver to account for and pay to the United States the moneys so received, and it does not lie in the mouths of the sureties on his official bond to raise an objection to the payment of the moneys to him, which he could not raise, and which is not raised by the pre-emptors, or the United States. Their responsibility for the moneys so received is therefore clear.

In support of this view, the case of *King* v. *United States*, 99 U. S. 229, is in point. That was a suit brought against one Chase, a collector of internal revenue, and the sureties on his official bond, to recover taxes collected by him, and never accounted for or paid over. The facts were that on June 1, 1868, the Toledo, Wabash, and Western Railroad Company was indebted to the United States in a large sum for the five per

cent tax for interest paid on its first-mortgage bonds. The tax was, on the day named, paid to Chase by the treasurer of the company. At the time of the payment the treasurer delivered to Chase the monthly returns of the taxes so due, in the form prescribed by law, signed by him as treasurer, but not sworn to, and which had never been filed with or delivered to the assessor. Chase delivered to the assessor all these returns, except those for August, September, and October, 1867, which were never delivered. He did not at any time make mention of them in his report to the government, and he retained the amount, $24,923, paid by the company as the tax upon the returns for the three months just mentioned. Five years after his receipt of this money, and when he had become insolvent, suit to recover it was brought on his official bond. The defence set up by his sureties was that, as the money was not received by him, on any return made to the assessor, or on any assessment of said taxes made by the assessor or by the Commissioner of Internal Revenue, and as the return delivered to Chase by the treasurer of the company was not verified by oath, it was a voluntary deposit of money in his hands by the treasurer, and was not received by him in his official capacity; that it was not his duty to receive it for the government; and the sureties were not liable because its receipt was an unofficial act.

But the court held that the payment of the taxes to the collector was a good payment to him in his official capacity, that the money so paid was the money of the United States, and that the sureties on his bond were responsible for it.

This case is so apposite to the question in hand, and so conclusive, as to require no further remark.

It is next contended by the plaintiffs in error that they are not liable for the $1,400 received during the absence of Potter, extending from April 9 to June 30, 1874, by the person whom he had left in charge of his office, because that person had no authority to perform any of the duties of receiver.

There are two sufficient replies to this contention. First, no such defence is set up in the answer or amended answer of the plaintiffs in error. They cannot complain that the Circuit Court did not give effect to a defence which they did not think it worth while to plead. Second, it is not made to appear by

the bill of exceptions that any money was paid to Goodfellow, the person left by Potter in charge of his office, which was not due the United States from pre-emption entries made by persons who had proved the settlement and improvement of the land to the satisfaction of both the receiver and register. If, therefore, this contention of the plaintiffs in error is sustained, we should, in effect, decide that the sureties of the receiver would not be answerable for public moneys paid, with his concurrence and assent, to his assistant or cashier, but only for moneys actually paid into the hands of the receiver himself. It requires no argument to expose the fallacy of such a conclusion. If a public officer sees fit to allow the money of the government to be paid during his absence from his office into the hands of his agent or servant, it is a good payment to him, and the risk is with him and his sureties and not with the government.

Judgment affirmed.

HOFFHEINS v. RUSSELL.

1. Claims 1, 8, 9, 11, 12, 14, 16, and 19 of reissued letters-patent No. 2224, granted April 10, 1866, to Reuben Hoffheins, for an "improvement in harvesters," the original, No. 35,315, having been granted to him May 20, 1862; and claims 1, 2, 6, 7, and 9 of reissued letters-patent No. 2490, granted Feb. 19, 1867, to him, for an "improvement in harvesters," the original, No. 40,481, having been granted to him Nov. 3, 1863, and reissued in two divisions, one, No. 1888, Feb. 28, 1865, and the other, No. 2102, Nov. 7, 1865; and No. 2490 having been issued on the surrender of No. 2102, — considered; and the difference between the specifications and the drawings of No. 35,315 and those of No. 2224, and that between the raking apparatus and rake-support of No. 2224 and those of the defendants, pointed out.
2. There is no warrant in No. 35,315 for locating the rake-support, or any part of it, on the finger-beam, and as each of the above-named claims of No. 2224 has, as an element, either a rake, or a rake and reel, mounted on, or attached to, the cutting apparatus or the finger-beam, No. 35,315 could not lawfully be reissued with those claims.
3. The defendants devised a new arrangement of rake, which made it possible to mount a rake-support on the heel of the finger-beam, where the rake-support of No. 2224 could not be mounted. The difference between the yielding belt-tightener of No. 2224 and their arrangement for driving the

raking apparatus pointed out, and the latter held not to be a mechanical equivalent for the former.

4. No. 40,481 negatives the idea of mounting the rake-post on the finger-beam, while an element in claim 1 of No. 2490 is the mounting of the raking mechanism on the finger-beam. In No. 2490, a driver's seat mounted on the main frame, so as to enable the driver to ride on the machine while the rake is in operation, is an element in claims 1 and 9, while the driver's seat in No. 40,481 is not, and cannot be, in such a position that the driver can ride on the seat while the rake is in operation.
5. The raking apparatus is an element in claims 2, 7, and 9 of No. 2490, and, in view of the differences between the two machines, in the construction of the raking mechanism and the arrangement and location of the rake-post, the rake of claims 2, 7, and 9 is to be construed to be such a rake, and one so arranged, on a rake-post so mounted, as is shown and described in the specification, and thus does not include the defendants' raking mechanism or rake-post.
6. The driving device in claims 6 and 7 of No. 2490 held not to include the defendants' driving device, the former being an extensible tumbling shaft and the latter a chain belt with open links, and patentability or invention inhering only in the device and not in its location.
7. No cause of action is established against the defendants on either of the patents sued on.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

The facts are stated in the opinion of the court.

Mr. George H. Christy and *Mr. John H. B. Latrobe* for the appellant.

Mr. George Harding and *Mr. John R. Bennett* for the appellees.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This suit is brought for the infringement of two reissued letters-patent granted to Reuben Hoffheins, the appellant. One, No. 2224, was issued April 10, 1866, for an "improvement in harvesters," the original patent, No. 35,315, having been issued to him May 20, 1862. The other, No. 2490, was issued Feb. 19, 1867, for an "improvement in harvesters," the original patent, No. 40,481, having been issued to him Nov. 3, 1863, and reissued in two divisions, one, No. 1888, Feb. 28, 1865, and the other, No. 2102, Nov. 7, 1865, and No. 2490 having been issued on the surrender of No. 2102.

No. 2224 contains nineteen claims, and No. 2490 contains

nine claims. In No. 2224, claims 1, 8, 9, 11, 12, 14, 16, and 19, and in No. 2490, claims 1, 2, 6, 7, and 9, are alleged to have been infringed. The Circuit Court rendered a decree that the appellees had not infringed any invention of which the appellant was the original and first inventor, recited in the two reissues sued on; that No. 2224 "contains inventions different from that contained" in No. 35,315; that No. 2490 contains inventions different from that embraced in No. 40,481; that the said reissues respectively are, therefore, void; and that the bill be dismissed. From this decree this appeal is taken.

In No. 2224 the claims in question are these: "1. A sweep-rake, which is mounted upon the heel of the finger-beam proper, or upon the inner front corner of the platform of a harvester which has its cutting apparatus and platform hinged to the draft-frame, all in such manner that the rake-arm sweeps the platform from front to inner side, and maintains a correct position in relation to the finger-beam and platform during the rising or falling movements thereof on the joint or joints by which the finger-beam is connected to the draft-frame, substantially as set forth." "8. In a harvesting machine which has its cutting apparatus hinged or jointed to the main frame in such manner as to allow it to conform at both ends to the undulations of the ground, and a rake mounted upon the said cutting apparatus, or upon the platform thereof, I claim so constructing and arranging the several parts, that the support of the rake can occupy a position outside of the inner drive-wheel B, or a position which is between the point of suspension *h* and the outer divider G, and can also be hung or be suspended below the draft-frame, substantially as described." "9. Effecting a combination of a rake and reel, located substantially as described, and a finger-beam and platform, with the main frame, by means of a hinged draw-bar, *b*, and hinged brace, I, or hinged suspender, *f*, and an extension bracket, 2, or their equivalents, substantially as and for the purposes described." "11. Preventing a too sudden or abrupt deflection of a rake and reel mounted upon a hinged-joint cutting apparatus, by carrying the point of suspension beyond the rake-support toward the centre of the draft-frame, by means substantially as described." "12. A continuously revolving

rake, which is mounted directly and wholly upon the platform or finger-beam, so as to rise and fall therewith independently of the draft-frame, when said rake is located between the centre of the draft-frame and the outer divider, and passes in at the front of the machine upon the platform and sweeps around to the inner side of the platform, substantially as described." "14. The combination of a suspended hinge-joint cutting apparatus of harvesters, and a combined rake and reel, which is mounted directly and wholly upon the suspended platform or hinged finger-beam, substantially as and for the purpose described." "16. The combination of a combined rake and reel, mounted upon a hinged-joint cutting apparatus, and a yielding belt-tightener, substantially as and for the purpose described." "19. Providing, in a harvester with the rake attached to its hinged finger-beam or platform, an extensible means for driving the rake, which will permit the platform and rake to rise and fall together, and accommodate themselves independently of the draft-frame to the undulations of the ground, substantially as described and for the purpose set forth."

The original patent, No. 35,315, in stating what the invention is, says that it consists of certain improvements "in the manner of mounting and operating a revolving rake." There were three features set forth in the specification of No. 35,315: 1. The peculiar construction of the reel and rake. 2. The peculiar form and location of the rake-post. 3. The peculiar manner of operating the rakes. There were only three claims in No. 35,315, one covering each of said three features, as follows: "(1.) A combined reel and rake, rotating upon a vertical axis, and having its arms successively turned up into an inverted position to pass over the main frame, substantially as explained." "(2.) The inclined standard I, rigidly mounted upon a loosely hinged platform, and employed to support a revolving reel and rake in an unchangeable position in relation to the said platform, without obstructing the free motion of the latter." "(3.) The yielding and swivelled rod Q operating in combination with the band P and pulleys O and R, in the manner and for the purposes herein shown and explained."

A copy of the model filed in the Patent Office with the

original application for No. 35,315 is in evidence. The invention shown in the specification of No. 35,315 consists, in general terms, in mounting a rake upon a quadrant-shaped platform, said platform being hinged to the frame of a two-wheeled machine in such manner that the raking-arms will maintain at all times a proper working position relatively to the surface of the platform, and at the same time receive motion from driving mechanism mounted on the main frame, the result being accomplished by constructing the raking apparatus in a peculiar manner, and mounting it in a peculiar manner upon the platform of the machine, and, also, by connecting the driving mechanism of the rake with the driving mechanism on the main frame, by a belt mounted in a peculiar manner, so that the varying changes in the position of the platform and the raking apparatus relatively to the main frame and the gearing therein will not affect the driving mechanism of the rake. The specification says: "D is a segmental platform, provided with a divider, E, at its outer end, and resting upon a roller, *e*. F is a draw-bar, connected at front by a universal joint to the frame A, and attached at back to a shoe, *f*, upon which the inner side of the platform may rest. G is a lateral brace-rod, hinged at one end beneath the right-hand rear corner of the main frame, and at the other to the draw-bar F, or shoe *f*. H is a link by which the inner end of the platform is suspended from the back of the main frame." This language describes the parts which relate to the platform and the devices by which it is attached to the main frame, and by which it is permitted to vary its movement relatively to the main frame, to conform to the unevenness of the ground, and there is nothing else on the subject in the text of the specification. In the drawings of No. 35,315 the suspending link H, by which the inner side of the platform is suspended from the main frame, so as to keep it on a level with the wheel at the outer shoe, at the opposite side of the platform, is attached at its lower end to an arm which extends out from the platform nearly to, but short of, the middle of the width of the tread of the left-hand driving-wheel B, but the drawing represents the central line of the link H as in the vertical plane of the left-hand edge of the tread of the wheel B, so as to put the point of

suspension in a vertical line with the left-hand edge of the tread of the wheel B. The model referred to shows the link as being suspended at a point on the frame to the right of the vertical plane of the left-hand edge of the tread of the wheel, but not to the right of the vertical plane of the middle of the width of the tread. In the reissue great stress is laid upon this point of suspension. In the specification of the reissue it is said: "From the inner corner of the finger-beam or platform, or from the metal foot-piece of the rake and reel-support, by which the support is screwed to and braced on the platform and finger-beam, a strong bracket, 2, is extended beyond the left-hand side-beam of the draft-frame. To the extremity of this arm a swinging-link or chain, *f*, is loosely connected or jointed, as at *g*, and by means of this link or chain the finger-beam, platform, and rake, though arranged at the left of the left-hand drive-wheel B, can be suspended from a point which is to the right of the said left-hand side-beam. The suspension is effected by hanging the upper end of the link or chain to the rear beam of the draft-frame, as represented at *h*." In the drawings of the reissue the point of suspension of the link is located a little to the right of the vertical plane of the middle of the width of the tread of the left-hand driving-wheel, and the arm or bracket to which the lower end of the link is attached extends to a point beyond, and at the right-hand of, the middle of the width of such tread. In the specification of No. 35,315 the word "finger-beam" is not found, nor is a finger-beam described in it or shown in the drawings.

As to the method of mounting the rake, the specification of No. 35,315 says: "I is a post rigidly secured to the inner side of the platform, and inclining over the rear of the main frame; *i* is a brace-rod extending from the draw-bar to the said post, to support the latter at top; J is a box mounted on the top of the post I, and constituting the bearing in which the disk K rotates. The rakes or reel-arms L L′ are mounted in couples upon the ends of horizontal shafts M M′, which are journalled at right angles across the rotating disk K." This is all that is found in that specification as to the location of the axis of the rake. On the other hand, the specification of the reissue says: "Fig. 9 is a rear elevation of a portion of the machine, show-

ing the manner of suspending the rake and reel-support upon the hinge-joint finger-beam or platform thereof." The drawings of the reissue show a finger-beam, and it is lettered, and referred to by letter in the text. The specification of the reissue further says: "It is also important to have the suspension of the rake made in such a manner that the base of the support of the axis of the rake is wholly upon the hinged finger-beam, or the platform thereof, and also that the rake, the finger-beam, and the platform shall be rigidly connected together." Here the word "finger-beam" is again introduced, as important in connection with the support of the axis of the rake. The expert for the defendants states that the drawings of No. 35,315 show the base of the support of the rake so far back, or to the rear of the front edge of the platform, that it cannot, in his opinion, be brought in contact with the finger-beam, without changing its locality very materially, or the mode of its construction or attachment. But the specification of the reissue says: "D is the finger-beam and E the platform of the harvester, the cutting apparatus and guard-fingers being left off. F is a support for a combined rake and reel. This support is mounted rigidly upon the inner front corner of the platform and heel of the finger-beam, but it may be mounted either wholly on the finger-beam or wholly on any part of the platform which is to the left of the left-hand drive-wheel B, or to the right of said drive-wheel, if it is a right-hand machine." There is no warrant in the original patent for locating the rake-support, or any part of it, on the finger-beam.

As to claim 1 of the reissue, the finger-beam is made an element of the combination, while in the specification and drawings of No. 35,315 there is no reference to a finger-beam. Moreover, the raking apparatus of the appellant is so constructed that when one of the arms has descended to force the grain towards the platform and to sweep across the platform, the opposite arm must be raised to such a point as to clear the wheel of the machine. The arms are in pairs, and the motion of one arm of a pair is controlled by the motion and operation of the opposite arm of that pair. The inclination of the two to each other is such that when one is sweeping across the platform the other forms an exactly opposite angle to the axis

on which they both revolve. Therefore, the support of the rakes must be so mounted that they can descend to the grain at the proper point in front of the cutters to press in the grain and sweep across the platform and deliver the gavels and then rise out of the way of the frame. To effect this, the point of vibration of the pair of arms must be raised so high and carried over towards the frame so far, that the descending arm may reach its proper position to do its work, while the other arm of that pair shall clear the frame in rising. Therefore, the support of the raking apparatus was required to be of such form and character and so placed relatively to the platform and frame, that one arm of a pair would not interfere with the working of the other arm of the same pair. Now, the arms of the raking apparatus are diametrical arms, the centres of which are axes mounted on a horizontal head, which head is so fastened on a vertical shaft that, the opposite ends of the arms being inclined to the axis of rotation, one end of one arm will descend and sweep across the platform, while the other will be carried in an exactly opposite direction, with its rake-teeth turned up while the teeth of its opposite arm are turned down. In such an arrangement, the bearing point or axis of rotation of the arms must be carried up a considerable distance above the platform and reach over in a diagonal direction from the front edge of the cutters to the delivery edge of the platform, so that the rake at its end next the base of the rake-support may be brought close enough to the platform to do its work. Hence, the inclined post of No. 35,315, described as so inclined and thus claimed in claim 2 of that patent. But, in the specification of the reissue, though the drawings show the same sort of inclined post or standard, it is said: "From the platform or finger-beam the support *may* extend in an inclined position as high as the top of the draft-frame, and then take a turn over toward the centre of said frame, as represented, so as to form a support for the rake and reel which shall be somewhat higher than the frame and between the two drive or supporting wheels. The particular shape and height of this support is not very material, so long as the base of it is affixed at some point between the centre of the main frame A and the outer shoe or divider G." The special kind of support

described and shown in the patents, original and reissued, is essential to the operation of the special kind of raking apparatus there described. But the appellees' machine has a raking apparatus differently organized. In it each arm moves independently of every other arm, the arms are not coupled in pairs, and each does its work without reference to the movement of any other. Therefore, it is unnecessary to raise the supporting point of the rake-arms to any considerable height or to carry it over to a location between the drive-wheels, and in the appellees' machine the pivot on which the rakes revolve is at a considerable distance towards the outer shoe and is not all between the drive-wheels. The appellees' sweep-rake is not substantially such a sweep-rake as is referred to in claim 1 of the reissue, nor is it mounted in such a manner as to perform the functions of the appellant's rake. The rake-post in the appellees' machine is vertical and not inclined, and is mounted on the shoe or inner end of the finger-beam.

In analyzing the two machines, in view of the state of the art, it appears that the appellant adapted a continuously revolving gathering and discharging rake to a two-wheeled loosely jointed finger-bar machine. To do this he employed a peculiar rake and a peculiar rake-support. The appellees employ an entirely different rake. They have a series of radial arms pivoted each independently of every other in a head, which has a double cam guideway for each arm, and the arms are thereby elevated vertically so as not to strike the frame in passing up. This makes it possible for the appellees to place the support for their rake on the finger-beam by the side of the frame and in the line of the cutters instead of behind the frame. No such organization is possible with the appellant's arrangement of rakes. The centre of movement of his rakes must be brought in line with the cutters by having an inclined rake-post, the base of which is not in a vertical line with the line of the cutters. He shows no mode of placing the base of the post on the finger-beam. If it were placed there, with his arrangement of rake-arms, and his inclined post, the centre of motion of the arms would be so far out of its proper position that the arms would not do their work. Having independent radial arms, the appellees can have a vertical and not an

inclined rake-post, and can bring the centre of motion of the arms in a line with the cutters by mounting the vertical post on the finger-beam. They do this, and for that purpose they have a bridge over the inner shoe of the finger-beam for the foot of the rake-post to rest on, while at the same time the cutters can vibrate under the bridge. The post is hollow and supports the cam guideway, and the vertical shaft which revolves the rakes passes up in and through the hollow post. The appellees have not borrowed from the appellant. They devised a new arrangement of rake which made it possible for them to mount their rake-support on the heel of the finger-beam proper, where the appellant can never mount his and where that of the appellees is mounted. The theory of the reissue appears to be that, as the original patent shows a special device for supporting a special arrangement of rakes, such device being located on a particular part of the platform other than, and not possible to be, a part of the finger-beam, he can claim in a reissue any device for supporting a revolving rake, even one located on the finger-beam. To carry out this view, the word "finger-beam" is interpolated in the specification, in this connection, as an addition to the word "platform," and the rake-post is described as being attached to the finger-beam *or* the platform. But there is an entire absence in the original specification, and in the reissued specification, of any description of any means by which the rake-support can be attached to or mounted on the finger-beam, or by which the rakes can be made to work with the rake-support in that location, or by which the connecting-rod of the cutters can be free to work with the support so placed. The law of reissues never at any time, or under any construction, allowed that to be done which has been thus attempted in this case.

The foregoing views apply also to claims 8, 9, 11, 12, 14, 16, and 19, being all the other claims alleged to have been infringed, and each of which has, as an element, either a rake, or a rake and reel, mounted on or attached to the cutting apparatus or the finger-beam.

In the reissue claim 2 is substantially the same as claim 1 of the original, claim 5 (with the interpolation of the finger-beam) is intended to take the place of claim 2 of the original,

and claim 18 corresponds with claim 3 of the original. Yet the appellees' machine is not alleged to infringe either claim 2, claim 5, or claim 18 of the reissue, nor does it embrace what was covered by any one of the three claims of the original. As to the yielding belt-tightener of the appellant, which is the subject of claim 3 of the original patent and is an element in claim 16 of the reissue, the appellees' machine does not employ any device which performs the function of tightening a belt. It uses, to communicate motion from the main axle to the raking apparatus, an old form of chain belt, composed of square open links, connected by loops of metal between the links, and the links arranged to run over sprocket-wheels, which have teeth on them corresponding to openings in the links of the chain, and which prevent the chain from slipping on the wheels. As the links of the chain engage positively with the teeth on the sprocket-wheels, there is no need of a belt-tightener, as no slackness in the chain can interfere with the driving action. The only function of the appellees' device which holds up, by a yielding pressure, the under part of the chain belt, is to so guide that part, when slack, that the teeth on the sprocket-wheels may readily enter the links of the chain. The appellant's belt could not, in the same position, drive the raking apparatus so as to make it work properly. The appellees, by the use of sprocket-pulleys and a chain, dispense with a tight friction-band, and with a pulley around which the platform vibrates, and with a tightening pulley. Their arrangement is not an equivalent, in mechanism or functions, for that of the appellant.

It is made an element of claim 11 of the reissue that the point of suspension of the platform to the main frame is carried beyond the rake-support toward the centre of the draft-frame, by means described in the specification, so as to prevent a too sudden or abrupt deflection of the rake and reel. The specification of the reissue says, that "it is important that the great weight of the rake, finger-beam, and platform shall not cause the draft-frame to tilt over on its right-hand drive-wheels by sudden and abrupt motions, but shall tend to insure a square run of the draft-frame upon the ground during the pitching or rising and falling motions of the finger-beam, platform, and rake, and thus

an even and easy draft for the team be secured." But the reissue shows the point of suspension of the platform to the main frame as being nearly under the axis on which the rake-arms revolve, and said point is near the vertical plane of the middle of the width of the tread of the drive-wheel which is next to the cutters, so that the inner end of the platform is subject to all the vertical motions of such drive-wheel. The point of suspension being in the pathway of the wheel, the rising or falling motion of the wheel must be communicated to that end of the cutters which is next to such wheel. In the appellees' machine the suspension of the platform is made by an arm extending out from the finger-bar or inner shoe to a point about opposite the centre of the main frame, and which arm is there suspended by a chain to a hook on the frame, so that the weight of the cutting apparatus and rake and inner part of the platform is transferred to a point nearly central between the drive-wheels. The appellant's structure shows no such organization, and does not involve what the appellees have done.

For the foregoing reasons, without considering the many other questions raised in the case, it must be held that the appellant has not established any cause of action against the appellees on reissue No. 2224.

In No. 2490 the claims in question are these: "1. The combination, in a two-wheeled hinged-joint machine, of a driver's seat mounted upon the main frame, with a raking mechanism mounted upon the finger-beam, and rotating around a vertical axis, or one nearly so, substantially in the manner described, for the purpose of enabling the driver to ride on the machine while the rake is in operation." "2. The combination, in a two-wheeled hinged-joint machine, of a shoe with a hinged joint in it, with a rake and platform having an extension, J^2, and with a draft-frame which sustains the weight of the cutting apparatus and raking apparatus with platform attached, at a point between the two drive-wheels." "6. Driving a revolving rake, or a combined revolving rake and reel, which move about a vertical or nearly vertical axis, by a device arranged on the grain side of the inner drive-wheel or inner side of the draft-frame." "7. Making a direct driving connection

between a revolving rake, or a combined rake and reel, which move about a vertical or nearly vertical axis, and the inner end of the main frame axle of the draft-frame." "9. The combination of a quadrant platform, hinged finger-beam, revolving rake, and a driver's seat supported by the main frame."

The original patent, No. 40,481, says that the improvements covered by it consist, 1st, in a peculiar construction and combination of frame, gearing, and double driving-wheels; 2d, in a device for affording protection to the main crank-shaft and strengthening the main frame; 3d, in the use of a movable tongue; 4th, in a device for permitting the finger-beam to turn freely on its own axis. There were only four claims in No. 40,481, one covering each of said four features, as follows: "1. The main frame and gear-frame A A, constructed as described, open at each end, when used in combination with shafts, gearing, and double driving-wheels arranged and operating substantially as and for the purposes specified." "2. The flange *a* cast or formed upon the gear-frame for the combined purposes of strengthening the latter and protecting the crank-shaft E, as hereinbefore explained." "3. The movable tongues K, adapted to be attached to the frame on either side of the wheel B′, and employed to support or raise the inner end of the beam." "4. Attaching the shoe to the drag-bar by a transverse swivel-joint, to permit the finger-beam to turn its axis to elevate or depress the joints of the fingers, or to fold the beam against the frame for transportation, when combined with bracing-guides *h*′, substantially as herein described."

Every one of the four claims of No. 40,481 — the iron frame cast in one piece, the flange, the movable tongue, and the transverse swivel-joint — is omitted from the reissue, and there are no corresponding claims. The rake-support is of the same form and in the same location as in No. 35,315, inclined and mounted on the platform, and not on the finger-beam, and the inner end of the platform is suspended on the main frame in the same way as in No. 35,315. The specification of No. 40,481 says: "On the inner side of the grain platform, near the heel of the finger-beam, is firmly mounted a post, R, which may incline over toward the main frame, as shown in Figure 1." This passage negatives the idea of mounting the post on the

finger-beam, and draws a distinction between the platform and the finger-beam as a location for the attachment of the post. The only mention of a driver's seat in No. 40,481 is this: "W represents the driver's seat." In the specification of the reissue the following language is found: "My first improvement consists in the combination, in a two-wheeled hinged-joint machine, of a driver's seat mounted upon the main frame, with a raking mechanism mounted upon the finger-beam, and rotating on a vertical axis, or one nearly so, substantially as hereinafter described, for the purpose of enabling the driver to ride upon the machine while the rake is in operation." Again, after describing the construction and arrangement of the rake or reel arms, which are the same as in No. 35,315: "By this means the rake- and reel-arms will stand high enough above the draft-frame on the inner side of the machine, to move clear of the driver, who sits upon the machine in a seat, W, which is mounted upon the main frame, as shown, or in any other position on the frame that will give the greatest convenience and advantage from his weight and use of his hands in the management of the machine." Again: "From the foregoing description it will be seen that my invention enables me to combine in a self-raking harvester all the advantages derived from the two-wheeled hinged-joint machine, and still use a rake that turns about an axis, or revolves entirely about the same, and at the same time have the driver or manager ride upon the main or draft frame in such a position that his weight may aid in counterbalancing the weight of the rake and platform, and his hands may be conveniently employed for controlling the machine."

As to claim 1 of the reissue, although there is in No. 40,481 a driver's seat mounted on the main frame, it is not in such a position, nor can it be placed on the frame described in such a position, that the driver can ride on the seat while the appellant's rake is in operation. The appellees' raking apparatus has been above described. The appellant's raking apparatus is like that of No. 35,315 and of reissue No. 2224. If the appellant's raking apparatus were substituted in the appellees' machine for their raking apparatus, no person could ride on the driver's seat located anywhere on the frame of the appel-

lees' machine, as it is constructed, with the rake in operation. The seat shown in the drawings of No. 2490 is mounted on a portion of the frame which extends to the rear of the main axle, and the seat itself is shown as placed in the rear of said axle. Consequently, a driver located on said seat would add his weight on the same side of the main axle on which the raking apparatus is mounted, so that the idea of any counterbalancing weight from the position of the driver is negatived by the arrangement. In the appellees' machine, the organization of the raking mechanism, before described, is such that the driver's seat may be located towards the front of the main frame, where he cannot be struck by the rake-arms, and where his weight will aid in counterbalancing that of the rake and the platform. No such organization of raking mechanism is shown or described in No. 2490, nor any such arrangement of seat relatively thereto. Moreover, claim 1 of No. 2490 requires that the raking mechanism be mounted on the finger-beam. Such a construction is not shown or described in No. 2490, or in No. 40,481. The raking apparatus in the appellees' machine is mounted directly on the finger-beam. The views hereinbefore expressed in connection with No. 2224 apply to No. 2490, so far as the mounting of the rake-post on the finger-beam and the arrangement of the raking mechanism are concerned.

As to claim 2, the raking apparatus is made an element in it, and the differences, before pointed out, between the two machines, in the construction of the raking mechanism and the arrangement and location of the rake-post, lead to the conclusion that the rake mentioned in claim 2 must be construed to be such a rake, and one so arranged, on a rake-post so mounted, as is shown and described in the specification, and thus does not include the appellees' raking mechanism or rake-post.

As to claim 6, the driving device must be limited to one substantially the same as that of the appellant. He has an extensible tumbling-shaft. The appellees have a chain belt, with links, before described. Their arrangement requires that the axis of the driving-wheel and the driven-wheel shall be substantially parallel, while No. 2490 requires that in the appellant's structure the axes of the two wheels, or the ends of

the axes, shall incline towards each other at a considerable angle. The tumbling-shaft, if used, must be used in such a location that the chain belt would not work in the same place. The two devices are not mechanical equivalents for each other. One could not be substituted for the other without a rearrangement of parts. Their only resemblance is that both communicate motion. The place where the device is arranged, namely, as the claim says, on the grain side of the inner drive-wheel or inner side of the draft-frame, imparts no patentable or inventive quality, in this case. That inheres only in the device.

In regard to claim 7, the appellant's raking apparatus and driving device are elements in it, and the observations before made apply, so that the appellees' raking apparatus and driving device are not covered by this claim.

Claim 9 includes the rake and the driver's seat, and, under the views before stated, the appellees' machine cannot be held to infringe that claim.

These conclusions make it unnecessary to consider any other question.

Decree, in so far as it dismisses the bill, is

Affirmed.

MONTCLAIR v. RAMSDELL.

1. The township of Montclair in the county of Essex, New Jersey, had authority to issue bonds to be exchanged for bonds of the Montclair Railway Company.
2. The Constitution of New Jersey provides: "To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title." *Held*, 1. That this provision does not require the title of an act to set forth a detailed statement, or an index or abstract, of its contents; nor does it prevent uniting in the same act numerous provisions having one general object fairly indicated by its title. 2. That the powers, however varied and extended, which a township may exercise constitute but one object, which is fairly expressed in a title showing nothing more than the legislative purpose to establish such township.
3. The conflict between the Constitution and a statute must be palpable, to justify the judiciary in disregarding the latter upon the sole ground that it

embraces more than one object, or that, if there be but one, it is not sufficiently expressed in the title.

4. The holder of the bonds is presumed to have acquired them in good faith and for value. But if, in a suit upon them, the defence be such as to require him to show that value was paid, it is not, in every case, essential to prove that *he* paid it; for his title will be sustained if any previous holder gave value.

ERROR to the Circuit Court of the United States for the District of New Jersey.

The judgment below was in accordance with the verdict in an action brought by the defendant in error on certain bonds, payable to Samuel Holmes or bearer, and on coupons thereof payable to the holder, all dated March 17, 1870, and alleged to have been issued by the township of Montclair, Essex County, New Jersey. They are negotiable in form, and purport to have been executed in pursuance of an act approved April 9, 1868, entitled "An Act to authorize certain townships, towns, and cities to issue bonds, and to take the bonds of the Montclair Railway Company," — a corporation created with authority to construct a railway from the village of Montclair to the Hudson River at Pavonia or Hoboken ferries, or between those points. On the margin of each bond is the certificate of the county clerk of Essex County that it is registered in his office.

The first section of the foregoing act — which was declared to be a public act to take effect immediately upon its passage — provides: —

"SECT. 1. That on the application in writing of twelve or more freeholders, residents of any township, town, or city along the route of the Montclair Railway Company, or at the terminus thereof (*except the township of Bloomfield*, in the county of Essex, *which township is hereby excepted from the operation of all the provisions of this act*), it shall be the duty of the judge of the Circuit Court of the county wherein such freeholders shall reside, within ten days after receiving such application, to appoint under his hand and seal not more than three freeholders, residents of such township, town, or city, to be commissioners thereof, to carry into effect the purposes and provisions of this act; said commissioners shall hold their offices respectively for the term of five years, and until others shall have been appointed."

The second and third sections are as follows: —

"SECT. 2. That it shall be lawful for said commissioners to borrow, on the faith and credit of their respective townships, towns, or cities, such sums of money, not exceeding twenty per centum of the valuation of the real estate and landed property of such township, town, or city, to be ascertained by the assessment rolls thereof, respectively, for the year 1867, for a term not exceeding twenty-five years, at the rate of interest not exceeding seven per centum per annum, payable semi-annually, and to execute bonds therefor, under their hands and seals respectively. The bonds so to be executed may be in such sums, and payable at such times and places, as the said commissioners, and their successors, may deem expedient; but no such debt shall be contracted, or bonds issued by said commissioners of, or for either of said townships, towns, or cities, until the written consent of the persons owning or representing as agent or president at least two-thirds of the real estate and landed property of such township, town, or city, borne on the last assessment roll thereof, at the valuation thereon appearing, shall have been obtained.

"Such consent shall state the amount of money authorized to be raised in such township, town, or city, and that the same is to be invested in the bonds of said railway company, and the signatures shall be proved by one or more of said commissioners. The fact that the persons signing such consent own or represent, as aforesaid, at least two-thirds of the taxable real and landed property of such township, town, or city shall be proved by the affidavit of the assessor of such township, town, or city, indorsed upon or annexed to such written consent, and the assessor of such township, town, or city is hereby required to perform such service. Such consent and affidavit shall be filed in the office of the clerk of the county in which such township, town, or city is situated, and a certified copy thereof in the office of the clerk of such township, town, or city, and the same, or a certified copy thereof, shall be evidence of the facts therein contained, and shall be received as evidence in any court of this State and before any judge or justice thereof.

"SECT. 3. And be it enacted, That the said commissioners authorized by this act may, in their discretion, dispose of such bonds, or any part thereof, to such persons or corporations, and upon such terms as they shall deem most advantageous for their said townships, towns, or cities, but not for less than par, and the money that shall be raised by any loan or sale of bonds shall be invested in the

bonds of the said railway company for the purpose of building the railway thereof, and said money shall be applied and used in the construction of said railway, its buildings, equipments, and necessary appurtenances, and for no other purpose. The commissioners respectively, in the corporate name of each of their said townships, towns, or cities, shall subscribe for and purchase bonds of said railway company to the amount that they severally may have borrowed as aforesaid."

After providing that the commissioners shall execute their official bonds, with security to be approved by the judge (all of which was done in this case), and that they shall be a board to act for their respective townships, towns, and cities, with power, by a majority, to do any business authorized by the act, the twelfth and fourteenth sections declare: —

"SECT. 12. That all bonds issued in accordance with the provisions of this act shall be registered in the office of the county in which the township, town, or city so issuing is situated, and the words 'registered in the county clerk's office' shall be printed or written across the face of each bond, attested by the signature of the county clerk when so registered, and no bonds shall be valid unless so registered."

"SECT. 14. That in case any new township, town, or city *shall have been created*, or the boundaries of any township, town, or city shall have been enlarged on the routes of the said railway, or at the termini thereof, so that there is no assessment roll for the year 1867 for such township, town, or city so created or enlarged, the said commissioners for such *new* or enlarged township, town, or city shall cause to be prepared an assessment roll for the purposes of this act, by extracting from any assessment roll or rolls for said year all that relates to any assessment of persons or property in the territory embraced in the said *new township*, town, or city so enlarged or created, or in said enlargement."

On the fifteenth day of April, 1868, the legislature of New Jersey passed another act, the provisions of which are important. It is entitled "An Act *to set off from the township of Bloomfield*, in the county of Essex, *a new township*, to be called the Township of Montclair." The first section defines the boundary of the new township, and the second constitutes its inhabitants a body politic and corporate in law by the name of

"*The inhabitants of the township of Montclair*," with all the rights, powers, privileges, and advantages, and subject to all the regulations, government, and liabilities to which the inhabitants of the other townships in said county of Essex are or may be entitled or subject by the laws of the State.

The third section, after prescribing the time and place at which the first town meeting of Montclair should be held, and that the voting thereat should be by ballot until otherwise determined by law, declares: —

"That all the provisions and restrictions of an act entitled 'An Act to authorize the inhabitants of the several townships of this State to vote by ballot at their town meetings,' approved March twenty-second, eighteen hundred and sixty, and of the supplements thereto, shall apply to the inhabitants of the said township of Montclair, and all acts and parts of acts in force in the said township of Bloomfield at the time of the passage of this act are hereby extended to and shall be in force in the said township of Montclair, but the provisions of any act or acts from the operation of which the township of Bloomfield has, by any proviso or exception contained therein, been specially excepted, shall apply to and be in force in said township of Montclair from and after the time this act shall go into effect, the same as if the township of Bloomfield had not been specially excepted therein."

Mr. William M. Evarts and *Mr. Thomas N. McCarter* for the plaintiff in error.

Mr. John F. Dillon and *Mr. Rastus S. Ransom* for the defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court, and, after stating the foregoing facts, proceeded as follows: —

In behalf of the township of Montclair it is contended that the bonds and coupons in suit were executed and issued without legislative authority, and, consequently, are not enforceable. This proposition, being fundamental in the case, will be first considered.

It has been observed that the first section of the act of April 9, 1868, — the one referred to in the bonds, — expressly excepts from its operation the township of Bloomfield. The Circuit Court was of opinion, and so ruled, that Montclair, upon

being set off from Bloomfield Township, and made a separate municipal corporation, with all the rights, powers, and privileges of other townships in the same county, was no longer embraced in the exception of Bloomfield Township made by the act of April 9, 1868, but, as a distinct independent body politic and corporate, became entitled, in virtue of the fourteenth section of that act (and without reference to the proviso in the third section of the act of April 15, 1868), to take advantage of all the provisions of the original or bonding act. Some of the members of this court prefer not to rest the determination of the question of legislative authority upon that interpretation of the original act. But we are of opinion that the proviso of the third section of the act creating the township of Montclair — declaring in force, as to that township, "the provisions of any act or acts from the operation of which the township of Bloomfield has by any proviso or exception contained therein been specially excepted" — must be construed as taking Montclair out of the exception in the first section of the act of April 9, 1868, and adding it to the class of townships which, by that act, were authorized to raise money upon bonds, to be invested in bonds of the railway company. Thenceforward, the township of Bloomfield, within the meaning of the act of April 9, 1868, embraced only such territory and inhabitants as remained after Montclair Township was set off as an independent municipality. The recital in the bonds that they were issued in pursuance of that act must therefore be taken as referring to it, as enlarged or extended by the act of April 15, 1868.

It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed. We should assume that the legislature was aware, when the act of April 15, 1868, was passed, that a previous statute had expressly excepted Bloomfield Township from all of its provisions. When, therefore, they declared that the new township should come under the operation of *any* act from which Bloomfield had been specially excepted by any proviso thereof, the established canons of statutory construction require us to presume that the legislature understood the full legal effect of such a declaration. The pur-

pose, manifestly, was to relieve the new township from the disabilities imposed by the bonding act upon the township of Bloomfield as then established.

This would close the discussion of the question of legislative authority, but for another proposition which counsel have pressed with great earnestness. They insist that this construction of the act of April 15, 1868, brings it, or so much thereof as constitutes its third section, in conflict with sect. 7 of art. 4 of the New Jersey Constitution, which declares that "to avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title." The argument is not simply that the authority given by the act of April 9, 1868, to issue township bonds in aid of the Montclair Railway Company (which authority we have seen is imported into the act of April 15, 1868), is an object distinct and separate from others embraced by the Montclair Township act, but that such object is not expressed in the title of the latter act.

The purpose of this constitutional provision was declared by the Supreme Court of New Jersey in *State* v. *Town of Union*, 33 N. J. L. 350, to be "to prevent surprise upon legislators by the passage of bills, the object of which is not indicated by their titles, and also to prevent the combination of two or more distinct and unconnected matters in the same bill." Further, said the court: "It is not intended to prohibit the uniting in one bill of any number of provisions having one general object fairly indicated by its title. The unity of the object must be sought in the end which the legislative act proposes to accomplish. The degree of particularity which must be used in the title of an act rests in legislative discretion, and is not defined by the Constitution. There are many cases where the object might with great propriety be more specifically stated, yet the generality of the title will not be fatal to the act, if by fair intendment it can be connected with it." The case in which these remarks occurred involved the constitutionality of an act entitled "An Act to amend an act to incorporate the town of Union, in the township of Union, in the county of Hudson, approved March 29, 1864." The body of the act declared

valid a certain ordinance passed by the town of Union without the formalities required by its charter, but under which a sewer had been constructed. In response to the objection that the object of the act — the construction of sewers — was not expressed in its title, the court said: "The validity of acts with general titles has been so long recognized by our courts, that it cannot be questioned that under the title, 'An Act to *incorporate* the town of Union,' a government for the town could be established, including taxation for its support, courts for the trial of offenders, authority for laying out streets, building sewers, and making assessments. Under any other rule it would be impossible to organize a city government without a large number of distinct acts. If, under that general title, the formalities for building a sewer and making assessments may be prescribed, there is no reason why a dispensation from the use of the required forms may not be granted by an act entitled 'An Act to *amend* an act to incorporate the town of Union.'" "If this objection," continued the court, "was sustained, it would annul a large portion of the legislation of this State." The doctrines of that case were approved in *State* v. *City of Newark*, 34 N. J. L. 236. In the earlier case of *Gifford* v. *New Jersey Railroad Co.*, 2 Stock. (N. J.) 172, an act supplemental to a former act was sustained upon the ground that the objects of both acts "were parts of the same enterprise, and cannot be said to have any improper relation to each other."

Our attention is called by counsel for the defendant to *Rader* v. *Township of Union*, 39 N. J. L. 509, and *Pennsylvania Railroad Co.* v. *National Railway Co.*, 23 N. J. Eq. 441, 457. But these do not in the slightest degree impinge upon the doctrines of the other cases. Referring, in the Rader case, to the constitutional provision under examination, Chief Justice Beasley observed that its purpose is plainly twofold: "First, to secure a separate consideration for every subject presented for legislative action; second, to insure a conspicuous declaration of such purpose. By the former of these requirements, every subject is made to stand on its own merits, unaffected by 'improper influences,' which might result from connecting it with other measures having no proper relation to it; and, by the latter, a notice is provided, so that the public,

or such part of it as may be interested, may receive a reasonable intimation of the matters under legislative consideration." In the same case he said that the Constitution required "substantial unity in the statutable object." We do not understand these remarks as announcing any different rule from that established in the cases in 33 and 34 N. J. L. What was said in 23 N. J. Eq. is clearly in line with other cases. And the doctrines of the New Jersey court are in harmony with decisions of the highest courts of other States when construing similar provisions in the constitutions of their respective States. See authorities cited in Cooley's Const. Lim. 146, n. 1.

Upon the authority of these decisions, and upon the soundest principles of constitutional construction, we are of opinion that the objection taken to the act of April 15, 1868, as being (when construed as we have indicated) in conflict with the Constitution of New Jersey, cannot be sustained. The powers which the township of Montclair is authorized to exert, however varied or extended, constitute, within the meaning of the Constitution, one object, which is fairly expressed in a title showing the legislative purpose to establish a new or independent township. It is not intended, by the Constitution of New Jersey, that the title to an act should embody a detailed statement, nor be an index or abstract of its contents. The one general object — the creation of an independent municipality — being expressed in the title, the act in question properly embraced all the means or instrumentalities to be employed in accomplishing that object. As the State Constitution has not indicated the decree of particularity necessary to express in its title the one object of an act, the courts should not embarrass legislation by technical interpretations based upon mere form or phraseology. The objections should be grave, and the conflict between the statute and the Constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one object, or if but one object, that it was not sufficiently expressed by the title.

The assignments of error, unusually large in number, raise other questions. Such of them as we deem necessary to examine relate to the rejection as well of evidence offered as of instructions asked in behalf of the township.

The main provisions of the bonding act will be found in the statement which precedes this opinion. As preliminary to an issue of township, town, or city bonds, by such commissioners as might be appointed on the petition of freeholders, the statute requires the written consent of persons owning, or representing as agent or president, at least two-thirds of the real estate of the municipality, — the bonds so issued not, however, to exceed twenty per cent of the value of its landed property, and the consent so obtained stating the amount to be raised and that it is to be invested in the bonds of the railway company. The statute further provided, as we have seen, that the signatures of consenting freeholders should be proved by one or more of the commissioners; that the fact that the consenting freeholders owned or represented the requisite amount of landed property should be proved by the assessor, who was required to perform such service; and that the consent and affidavit should be filed in the office of the clerk of the county in which the municipality is situated, and a certified copy thereof in the office of the clerk of the township, town, or city, — the originals, or a certified copy thereof, to be received as evidence of the facts therein contained in any court of the State or before any judge or justice thereof.

The declaration in each count, whether on bond or coupon, expressly avers that in pursuance of the statute such consents were obtained; also, that the commissioner duly appointed and sworn, as directed by the statute, issued the bonds in suit; that thereafter, and before they respectively matured, a certain named bank became, for a valuable consideration, in public market paid, the holder and bearer thereof, and that thereafter, and before the commencement of suit, the plaintiff became, for a valuable consideration by him paid to said bank, and still is, the holder and bearer thereof.

The only plea in behalf of the township to the special counts on the bonds and coupons is *non est factum;* to the common count for interest, *nil debet.*

At the trial the plaintiff introduced evidence tending to show that the commissioners were duly appointed in the mode prescribed by statute. If their due appointment was put in issue by the general plea of *non est factum*, it is suffi-

cient to say that the question was properly submitted to the jury.

The plaintiff also produced at the trial, from the county clerk's office, the original consents with the affidavits connected therewith, and also certified copies from the office of the township clerk. They show that the freeholders consented to an issue of bonds, to an amount not exceeding $200,000, under the act of April 9, 1868, to "be exchanged for or their proceeds invested in the income bonds" of the railway company. Upon each is indorsed the affidavit of Van Giesen, assessor, showing that the consenting freeholders owned or represented at least two-thirds of the landed property of the township. These papers in form met all the requirements of the statute.

Numerous offers to introduce evidence in behalf of the township were denied. They were made in every form which the ingenuity of able counsel could suggest. Without incumbering this opinion with a detailed statement of them, it is enough to say that the township was denied the privilege of proving that the consents did not, in fact, represent the required amount of landed property; that Van Giesen, the assessor, made his affidavit without having extracted from any assessment roll the taxable value of the real estate to enable him to determine whether the consents represented sufficient real estate; and that the commissioners acted on that affidavit before Van Giesen had taken the oath of office. Upon the occasion of these offers, or of some of them, counsel for defendants, in response to inquiries by the court, disclaimed any ability to bring home to plaintiff knowledge of these departures from the requirements of the statute. Upon the same view of the law, as we suppose, counsel asked the court to give — but the court refused — the following instructions to the jury: "If the evidence satisfies the jury that there were circumstances of fraud or illegality in the inception of the bonds, or in the circumstances under which they were issued and disposed of by the commissioners, then the plaintiff cannot recover on the bonds without some proof that he purchased them for value, or gave some consideration for them."

. . . . . .

"That, by the issue presented by the pleadings in the case, the burden of showing that he was a purchaser for value, or claims title through such a purchaser, was on the plaintiff."

As to the last of these instructions, there is no ground whatever upon which it could stand. The pleadings did not, of themselves, impose upon plaintiff the necessity of showing either that he, or any prior holder of the bonds, was a purchaser for value. As holder he is presumed to have acquired them in good faith and for value. *Goodman* v. *Simonds*, 20 How. 343; *Murray* v. *Lardner*, 2 Wall. 110; *Shaw* v. *Railroad Company*, 101 U. S. 557; *Swift* v. *Smith*, 102 id. 442. The plea of *non est factum* did not put in issue the fact that he was the holder. Legislative authority for an issue of bonds being established by reference to the statute, and the bonds reciting that they were issued in pursuance of the statute, the utmost which plaintiff was bound to show to entitle him, *prima facie*, to judgment, was the due appointment of the commissioners and the execution by them, in fact, of the bonds. It was not necessary that he should, in the first instance, prove either that he paid value, or that the conditions preliminary to the exercise by the commissioners of the authority conferred by statute were, in fact, performed before the bonds were issued. The one was presumed from the possession of the bonds; and the other was established by the statute authorizing an issue of bonds, and by proof of the due appointment of the commissioners, and their execution of the bonds, with recitals of compliance with the statute. So we have often ruled in numerous cases with which the profession are familiar and which need not be cited.

But the contention of counsel is that it was competent, under the plea of *non est factum*, to prove either fraud or illegality in the inception of the bonds, in order to remove the presumption of *bona fide* ownership for value which arises from the mere possession of the bonds, and thus compel plaintiff to show that *he* paid value for them. Consequently, it is argued, the first of the foregoing instructions should have been given.

It is not necessary to extend this opinion by a review of the adjudications in the American and English courts to which our attention has been called, or to deduce therefrom a general rule

to govern every case in which it may be claimed that the proof upon the part of a defendant, in a suit upon a negotiable security, requires the holder, before he can recover, to show that he paid value. Without entering upon a critical examination of the authorities upon this important question of commercial law, and assuming, for the purposes of this case merely, that the proof, of the exclusion of which the township complains, was competent evidence for some purposes under the plea of *non est factum*, we are of opinion that the instruction in question ought to have been refused. Its rejection was proper for the reason, if there were no other, that it required the jury, if they believed either fraud or illegality in the inception of the bonds to have been established, to find for the township, unless the plaintiff proved that *he* purchased for value or gave some consideration for them. Such is not the law; for, if any previous holder of the bonds in suit was a *bona fide* holder for value, the plaintiff, without showing that he had himself paid value, could avail himself of the position of such previous holder. In Byles on Bills, 119, 124, it is correctly said that "if any intermediate holder between the defendant and the plaintiff gave value for the bill, that intervening consideration will sustain the plaintiff's title." In *Hunter* v. *Wilson*, 19 L. J. N. S. Ex. 8, the plea was that the bill of exchange was drawn by a named person, at the request and for the accommodation of the defendant, without any consideration or value whatever, and that it was indorsed by that person without any consideration or value given by the plaintiff for such indorsement either to the defendant or to said person, or to any other person whatsoever. It was held that the plea ought to have contained a statement equivalent to an allegation that none of the previous parties to the bill had given value for the indorsement. One of the judges remarked that "some party to the bill may have given value for it, so as to vest a valid title in the plaintiff. We cannot tell through how many hands it may have passed." It is not necessary in this case to hold that the plea in such a case should aver that no previous holder of a negotiable security paid value. But the case last cited is authority for the proposition that the present plaintiff may be protected by showing that some previous holder paid value.

This question was directly adjudged in *Commissioners* v. *Bolles*, 94 U. S. 104. One of the issues there was whether the plaintiff was a *bona fide* holder of certain municipal bonds. After stating that the legal presumption was that they were, the court, speaking by Mr. Justice Strong, said: "But the plaintiffs are not forced to rest upon mere presumption to support their claim to be considered as having the rights of purchasers without notice of any defence. They can call to their aid the fact that their predecessors in ownership were such purchasers. To the rights of those predecessors they have succeeded. Certainly the railroad company paid for the bonds and coupons by paying an equal amount of their stock, which the county now holds; and nothing in the special facts found shows that the company knew of any irregularity or fraud in their issue." The court proceeded: "And still more: the contractor for building the railroad received the bonds from the county in payment for his work, either in whole or in part, after his work had been completed. There is no pretence that he had notice of anything that should have made him doubt their validity. Why was he not a *bona fide* purchaser for value? The law is undoubted, that every person succeeding him in the ownership of the bonds is entitled to stand upon his rights."

When the instruction in question was asked, the proof was that the bonds had been issued by the commissioners, and exchanged with the railroad company for a like amount of the company's income bonds. That exchange was a substantial compliance with the statute. It was made under a contemporaneous agreement between the commissioners, the railway company, and certain trustees, mutually selected, whereby the bonds passed, upon the exchange, under the control of those trustees, and were deposited in the Union Trust Company, to be surrendered — $10,000 at a time — only as the work of constructing the railroad progressed, to the company or the contractor on their order. The receipt of the trust company shows that it agreed to deliver them to the contractor or his agents or assigns, on the joint order of the trustees or any two of them. And it was proven that the bonds were delivered to the contractor or upon his order between May 10, 1870, and Aug. 4, 1871. The road was constructed as contemplated,

and the income bonds of the company remained in the hands of the commissioners or of some of them. Whether those bonds ultimately proved to be of any value is of no consequence as between the township and the plaintiff.

It thus appears that when the court was asked to give an instruction upon the basis that plaintiff could not recover, unless it was proven that he paid value for the bonds, it was established beyond question that the bonds had previously passed into the hands, or become pledged for the benefit, of the contractor who built the road. He acquired an interest, or a lien, on the bonds, to secure payment of the amount due him for his work and labor. He, therefore, became a holder for value in the sense that he paid real, in contradistinction from apparent, value, without notice of any fraud or illegality affecting the bonds. Story on Notes, sect. 195; *Railroad Company* v. *National Bank*, 102 U. S. 14; Byles on Bills, 117. No evidence was introduced or offered which in any degree impeached his good faith, or proved knowledge on his part that the preliminary conditions prescribed by statute had not been fully performed. The character of the bonds as negotiable securities, free from defences which might have been available as between the original parties, was established by their being pledged for the benefit of the contractor. So that, even if there was fraud or illegality in the inception of the bonds (apart from such illegality as would have made them absolutely void by whomsoever held), a defence upon that ground would not have been good against the contractor, and consequently is not available against the plaintiff. The latter, in virtue of the new and independent title derived from or traced to a prior *bona fide* holder for value, could stand upon the rights of such holder.

In any view of the case, no error was committed to the prejudice of the township, in excluding any of the evidence offered, or in refusing any of the instructions asked in its behalf.

Other questions in the case we pass by, as not necessary to be examined. We have considered all that seemed to affect the substantial rights of the parties.

Judgment affirmed.

MONTCLAIR v. DANA.

The jury may be controlled in their determination of a question by a peremptory instruction, if the testimony is of such a conclusive character as would compel the court, in the exercise of a sound legal discretion, to set aside a verdict if one were returned in opposition to such testimony.

ERROR to the Circuit Court of the United States for the District of New Jersey.

The case is stated in the opinion of the court.

Mr. Thomas N. McCarter and *Mr. William M. Evarts* for the plaintiff in error.

Mr. Barker Gummere for the defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The bonds in suit are of the same issue as those involved in *Montclair* v. *Ramsdell*, *ante*, p. 147.

The cases do not materially differ, except in the circumstances under which the respective defendants in error became the holders of the bonds. In this, as in the other case, the plaintiff in error was denied the opportunity to establish certain facts which, it claimed, tended to show fraud or illegality in the inception of the bonds, apart from any question of legislative authority. If it be conceded that the excluded evidence was admissible under the plea of *non est factum*, — which was the only plea to the special counts on the bonds and coupons, — and, also, that it tended to show fraud or illegality in their inception, still there was no error in the ruling of the court. For if, as counsel contend, proof of such fraud or illegality would shift the burden of proof upon the defendant in error to show how and upon what consideration he came by them, that exigency was met by proof that he was in every sense a *bona fide* holder for value. That he purchased the bonds for value and without notice of any fraud or illegality upon the part of the commissioners in the exercise of the power conferred by the statute, was so clearly shown, that the court below was justified in saying to the jury — as, in effect, it did — that the evidence left no room to dispute the fact. The action of the court, in that respect, was consistent with the rule

frequently announced, that the jury may be controlled in their determination of a question by a peremptory instruction, if the testimony is of such a conclusive character as would compel the court, in the exercise of a sound legal discretion, to set aside a verdict if one were returned in opposition to such testimony. *Hendrick* v. *Lindsay*, 93 U. S. 143; *Phœnix Insurance Co.* v. *Doster*, 106 id. 30.

All other questions raised by the assignments of error, and which are deemed of any moment, are concluded by the decision in the Ramsdell case.

Judgment affirmed.

RUSSELL v. ALLEN.

William Russell, of St. Louis, "for the purpose of founding an institution for the education of youth in St. Louis County, Missouri," granted lands and personal property in Arkansas to John S. Horner and his successors, in trust "for the use and benefit of the Russell Institute of St. Louis, Missouri," with directions to the grantee to sell them, and to account for and pay over the proceeds "to Thomas Allen, President of the Board of Trustees of the said Russell Institute at St. Louis, Missouri," whose receipt should be a full discharge to the grantee. *Held*, that this was a charitable gift, valid against the donor's heirs and next of kin, although the institution was neither established nor incorporated in the lifetime of the donor or of Allen.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

The case is stated in the opinion of the court.

Mr. William Brown for the appellant.

Mr. Chester H. Krum and *Mr. William R. Donaldson* for the appellee.

MR. JUSTICE GRAY delivered the opinion of the court.

This is a bill in equity, filed on the 16th of April, 1878, by two of the heirs at law and next of kin of William Russell, of St. Louis, against Thomas Allen, to establish a trust in favor of Russell's heirs at law and next of kin, and for an account.

The bill alleges that on the 19th of July, 1855, William Russell and John S. Horner executed four indentures of trust,

by each of which Russell, in consideration of one dollar paid, "and for divers other good and valuable considerations, but chiefly for the purpose of founding an institution for the education of youth in St. Louis County, Missouri," granted and conveyed to Horner, his executors and administrators or successors, in trust forever, certain lands and personal property in the State of Arkansas, to have and to hold the same unto him, his executors, administrators, and successors, in trust "to and for the following uses and purposes, to wit, the said property is conveyed for the use and benefit of the Russell Institute of St. Louis, Missouri;" and empowered and directed him and them to sell the same as soon as conveniently might be, and to account for and pay over the proceeds yearly or oftener, deducting the reasonable expenses of executing the trust, "to Thomas Allen, President of the Board of Trustees of the said Russell Institute at St. Louis, Missouri, and his receipt therefor shall be a full discharge of the said party of the second part for the amount so paid and the application thereof;" and Horner's trust to be brought to a close and the net proceeds paid over as soon as conveniently might be, and if not concluded within ten years, the property remaining undisposed of to be sold by public auction and the proceeds paid over as before required. In each of the four indentures reference was made to the three others, and it was "declared that all of said conveyances, including this, are made to one and the same person for one and the same use and purpose, and that the same are and are to be deemed and taken and accounted for as one trust, according to the conditions of the deeds respectively, it having been intended by said deeds and this present one to convey all of the remaining property of the said William Russell in the said State of Arkansas to the said party of the second part, to and for the use and benefit of the said Russell Institute of St. Louis, Missouri." After this clause, in one of the indentures, were added the words, "represented by their president as aforesaid." Each indenture contained a covenant by Horner "faithfully to perform the trust hereby created."

The bill further alleges that Horner, in the execution of his trust, has converted a large portion of the property into money, has paid over to Allen the sum of about $50,000, and has con-

veyed and transferred to Allen the property remaining unsold, and that Allen holds and controls the whole fund, and has never applied to any court for aid in the disposition and application thereof, and has in no way used or recognized the fund as held by him in trust for the uses declared by Russell.

The bill further alleges that there was not at the time of the execution of the indentures aforesaid, nor before or since, any such educational institution as was referred to therein; that at the time of such execution Russell was from paralysis infirm in body and weak in mind, and that, while he then manifestly proposed to found such an institution, yet in his increasing incapacity of body and mind during the short period that intervened between that time and his death he failed to accomplish his philanthropic purpose; that he died in 1856, without ever having founded such an institution, or delegated to Horner or to Allen, or to any other person or corporation, authority to organize a Russell Institute, and that no such authority has hitherto been exercised or claimed by any person or corporation, and there is and has been no donee capable of receiving, holding, and administering the trust fund created by the indentures; that the beneficiaries of the trust, so far as can be determined by the terms of the indentures, are uncertain and indefinite, and the trust is invalid, and, there being no debts outstanding against Russell's estate, the trust fund belongs to his next of kin.

To this bill Allen filed a general demurrer, which was sustained and the bill dismissed. 5 Dill. 235. The plaintiffs appealed to this court. Pending the appeal, Allen has died, and his executors have been made parties in his stead.

The deeds of gift state that they are made "chiefly for the purpose of founding an institution for the education of youth in St. Louis County, Missouri;" they convey the property to Horner and his successors in trust "for the use and benefit of the Russell Institute of St. Louis, Missouri;" they direct him to sell the property and account for and pay over the proceeds "to Thomas Allen, President of the Board of Trustees of the said Russell Institute of St. Louis, Missouri," whose receipt shall be a full discharge of Horner; and they end by declaring that all these conveyances shall be deemed, taken, and accounted

for as one trust, and that it is the intention of the donor to convey the property included in all of them "to and for the benefit of the said Russell Institute of St. Louis, Missouri," to which one of the deeds adds, "represented by their president as aforesaid."

The donor thus clearly manifests his purpose to found an institution for the education of youth in St. Louis, to be called by his name; and he executes this purpose by conveying the property to Horner in trust, to hold and convert into money and pay that money to the officers of the institute when incorporated and a board of trustees appointed. The direction to pay the money to Allen, as president of the board of trustees, and the mention, at the close of one of the deeds, of the institute as represented by its president as aforesaid, clearly show that the fund is not to be paid to Allen individually; and while they imply the donor's wish that Allen should be the first president of the board of trustees of the institute, they do not make his appointment to and acceptance of that office a condition of the validity of the gift or of the carrying out of the donor's charitable purpose. The terms of the deeds clearly show that the donor did not contemplate or intend doing any further act to perfect his gift. It is not pretended that the allegations in the bill as to his weakness of body and mind amount to an allegation of insanity, and they are irrelevant and immaterial.

The principal grounds upon which the plaintiffs seek to maintain their bill are that the deeds create a perpetuity; that the uses declared are not charitable; and that, if the uses are charitable, there are no ascertained beneficiaries and no donee capable of assuming and administering the trust, and the uses are too indefinite to be specifically executed by a court of chancery. But these positions, as applied to the facts of the case, are inconsistent with the fundamental principles of the law of charitable uses, as established by the decisions of this and other courts exercising the ordinary jurisdiction in equity.

By the law of England from before the Statute of 43 Eliz. c. 4, and by the law of this country at the present day (except in those States in which it has been restricted by statute or

judicial decision, as in Virginia, Maryland, and more recently in New York), trusts for public charitable purposes are upheld under circumstances under which private trusts would fail. Being for objects of permanent interest and benefit to the public, they may be perpetual in their duration, and are not within the rule against perpetuities; and the instruments creating them should be so construed as to give them effect if possible, and to carry out the general intention of the donor, when clearly manifested, even if the particular form or manner pointed out by him cannot be followed. They may, and indeed must, be for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity. If the founder describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery; and an omission to name trustees, or the death or declination of the trustees named, will not defeat the trust, but the court will appoint new trustees in their stead.

The previous adjudications of this court upon the subject of charitable uses go far towards determining the question presented in this case. As the extent and effect of these adjudications have hardly been appreciated, it will be convenient to state the substance of them.

The case of *Baptist Association* v. *Hart*, 4 Wheat. 1, in which a bequest by a citizen of Virginia "to the Baptist Association that for ordinary meets at Philadelphia annually," as "a perpetual fund for the education of youths of the Baptist denomination who shall appear promising for the ministry," was declared void, was decided upon an imperfect survey of the early English authorities, and upon the theory that the English law of charitable uses, which, it was admitted, would sustain the bequest, had its origin in the Statute of Elizabeth, which had been repealed in Virginia. That theory has since, upon a more thorough examination of the precedents, been clearly shown to be erroneous. *Vidal* v. *Girard*, 2 How. 127; *Perin* v. *Carey*, 24 id. 465; *Ould* v. *Washington Hospital*, 95 U. S. 303. And the only cases in which this court has followed the

decision in *Baptist Association* v. *Hart* have, like it, arisen in the State of Virginia, by the decisions of whose highest court charities, except in certain cases specified by statute, are not upheld to any greater extent than other trusts. *Wheeler* v. *Smith*, 9 How. 55; *Kain* v. *Gibboney*, 101 U. S. 362.

In *Beatty* v. *Kurtz*, 2 Pet. 566, the owners of a tract of land (afterwards part of Georgetown) laid it out as a town, and made and recorded a plan of it, marking one lot as "for the Lutheran Church;" and the Lutherans of the town, a voluntary society not incorporated, erected and used a building upon this lot as a church for public worship, and fenced in and used the land as a church-yard, for the burial of others as well as of Lutherans, for fifty years. Upon these facts, it was held that the Bill of Rights of Maryland, affirming the validity of any sale, gift, lease, or devise of land, not exceeding two acres, for a church and burying ground, recognized, to this extent at least, the doctrine of charitable uses, under which no specific grantee or trustee was necessary; that this land had been dedicated to a charitable and pious use, beneficial to the inhabitants generally, which might at all times have been enforced through the intervention of the government as *parens patriæ*, by its Attorney-General or other law officer; and that a committee of the society might maintain a bill in equity to restrain by injunction the heirs of the original owners from disturbing that use.

In *Inglis* v. *Sailor's Snug Harbor*, 3 Pet. 99, a citizen of New York devised land to the chancellor of the State, the mayor of the city, and others, designating them all by their official titles only, and to their respective successors, in trust out of the rents and profits to build a hospital for aged, decrepit, and worn-out sailors, as soon as the trustees should judge that the proceeds would support fifty such sailors, and to maintain the hospital and support sailors therein forever; and further declared it to be his will and intention, that if this could not be legally done without an act of incorporation, the trustees should apply to the legislature for such an act, and that the property should at all events be forever appropriated to the above uses and purposes. An act incorporating the trustees was passed, and the hospital was established. A majority of the court held

that the trustees took personally and not in their official capacities, and that upon their incorporation the legal title vested by way of executory devise in the corporation as against the heirs at law; and the dissenting judges differed only as to the legal title, and not as to the validity of the charitable trust.

In *McDonogh* v. *Murdoch*, 15 How. 367, a citizen of Louisiana, declaring his chief object to be the education of the poor of the cities of New Orleans and Baltimore, made a devise and bequest to the two cities, one half to each, the income to be applied by boards of managers, who should be appointed by either city, but whose powers and duties he defined, and who should obtain acts of incorporation, if necessary, for the education of the poor and other charitable purposes, in various ways specified. And in case the two cities should combine together and knowingly and wilfully violate the conditions, then he gave the whole property to the States of Louisiana and Maryland, in equal halves, "for the purpose of educating the poor of said States under such a general system of education as their respective legislatures shall establish by law." The court held that the devise to the cities was valid, and that the testator's directions as to the management of the income "must be regarded as subsidiary to the general objects of his will, and whether legal and practicable, or otherwise, can exert no influence over the question of its validity;" and expressed the opinion that the failure of the devise to the cities would not have benefited the heirs at law, for in that event the limitation over to the States of Louisiana and Maryland would have been operative. 15 How. 404, 415.

In *Fontain* v. *Ravenel*, 17 id. 369, a testator, residing at the time of his death in Pennsylvania, appointed his wife and three others to be executors of his will, and authorized his executors or the survivor of them, after the death of his wife, to dispose of the residue of his estate "for the use of such charitable institutions in Pennsylvania or South Carolina as they or he may deem most beneficial to mankind, and so that part of the colored population in each of the said States of Pennsylvania and South Carolina shall partake of the benefits thereof." In that case, the testator had not himself defined the nature of the charitable uses, nor authorized any one but his executors to

designate them; and the point decided was that, they having all died without doing so, the Circuit Court of the United States for the District of Pennsylvania could not sustain a bill to establish them, filed by charitable institutions in Pennsylvania and South Carolina in the name of the administrator *de bonis non* and next of kin of the testator. The question there was, whether the authority of a court of chancery, under such circumstances, belonged to its ordinary jurisdiction over trusts, or to its prerogative power under the sign manual of the crown, which last has never been introduced into this country. See Boyle on Charities, 238, 239; *Jackson* v. *Phillips*, 14 Allen (Mass.), 539, 576, 588. No question of the validity of the gift as against the next of kin was presented; and even Chief Justice Taney, who, differing from the rest of the court, alone asserted that "if the object to be benefited is so indefinite and so vaguely described that the bequest could not be supported in the case of an ordinary trust, it cannot be established in a court of the United States upon the ground that it is a charity," distinctly admitted that a suit by an heir or representative of the testator to recover property or money bequeathed to a charity could not be maintained in a court of the United States if the bequest was valid by the law of the State. 17 How. 395, 396. Accordingly, in *Lorings* v. *Marsh*, 6 Wall. 337, the court dismissed a bill by the next of kin to set aside a bequest by a citizen of Massachusetts "in trust for the benefit of the poor," by means of such incorporated charitable institutions as should be designated by three persons appointed by the trustees or their successors; such a bequest being valid under the law of Massachusetts as habitually administered in her courts.

In *United States* v. *Fox*, 94 U. S. 315, this court, affirming the judgment of the Court of Appeals of New York in 52 N. Y. 530, held a devise of land in New York to the United States, for the purpose of assisting to discharge the debt contracted by the war for the suppression of the Rebellion, to be invalid, solely because by the law of New York, as declared by recent decisions of the Court of Appeals, none but a natural person, or a corporation created by that State with authority to take by devise, could be a devisee of land in that State. Where not prohibited by statute, a devise or bequest for such

a purpose is a good charitable gift. *Nightingale* v. *Goulburn*, 5 Hare, 484, and 2 Phillips, 594; *Dickson* v. *United States*, 125 Mass. 311.

In *Ould* v. *Washington Hospital*, 95 U. S. 303, a citizen of Washington devised land in the District of Columbia to two persons named, in trust to hold it "as and for a site for the erection of a hospital for foundlings," to be built by a corporation to be established by act of Congress and approved by the trustees or their successors, and, upon such incorporation, to convey the land to the corporation in fee. It was contended for the heirs at law that the devise was void, because it was to a corporation to be established in the future, and might not take effect within the rule against perpetuities, and because of the uncertainty of the beneficiaries; and reference was made to the Maryland Statute of Wills of 1798, still in force in the District of Columbia, providing that no will should "be effectual to create any interest or perpetuity, or make any limitation, or appoint any uses, not now permitted by the Constitution or laws of the State," and to a series of decisions in Maryland, holding that the Statute of Elizabeth was not in force in that State, and that charitable uses were there governed by the same rules as private trusts. But those decisions having been made since the separation of the District of Columbia from the State of Maryland, the court held that the case must be determined upon general principles of jurisprudence, and that the devise was valid.

The objection to the validity of the gift before us, as tending to create a perpetuity, is fully met by the cases of *Inglis* v. *Sailor's Snug Harbor*, *McDonogh* v. *Murdoch*, and *Ould* v. *Washington Hospital*, above cited, which clearly show that a gift in trust for a charity not existing at the date of the gift, and the beginning of whose existence is uncertain, or which is to take effect upon a contingency that may possibly not happen within a life or lives in being and twenty-one years afterwards, is valid, provided there is no gift of the property meanwhile to or for the benefit of any private corporation or person. Those cases are in accord with English decisions of the highest authority, of which it is sufficient to refer to the leading case of *Downing College*, reported under the name of *Attorney-Gen-*

eral v. *Downing* in Wilmot, 1 Dick. 414, and Ambler, 550, 571, and under the name of *Attorney-General* v. *Bowyer* in 3 Ves. 714, 5 id. 300, and 8 id. 256, and to the recent case of *Chamberlayne* v. *Brockett*, Law Rep. 8 Ch. 206. See also *Sanderson* v. *White*, 18 Pick. (Mass.) 328, 336; *Odell* v. *Odell*, 10 Allen (Mass.), 1.

That the gift is for a charitable use cannot be doubted. All gifts for the promotion of education are charitable, in the legal sense. The Smithsonian Institution owes its existence to a bequest of James Smithson, an Englishman, "to the United States of America, to found at Washington, under the name of the Smithsonian Institution, an establishment for the increase and diffusion of knowledge among men." See Acts of Congress of 1st July, 1836, c. 252; 10th August, 1846, c. 178. This was held by Lord Langdale, Master of the Rolls, in *United States* v. *Drummond*, decided in 1838, to be a good charitable bequest. The decision on this point is not contained in the regular reports, but appears by the letters of Mr. Rush, then Minister to England (printed in the Documents relating to the Origin and History of the Smithsonian Institution, published by the Institution in 1879), to have been made after full argument in behalf of the United States by Mr. Pemberton (afterwards Mr. Pemberton Leigh and Lord Kingsdown), and on deliberate consideration by the Master of the Rolls. History of Smithsonian Institution, 15, 19, 20, 56, 58, 62. And it was cited as authoritative in *Whicker* v. *Hume*, 7 H. L. Cas. 124, 141, 155, in which the House of Lords held that a bequest in trust to be applied, in the discretion of the trustees, "for the benefit and advancement and propagation of education and learning in every part of the world, as far as circumstances will permit," was a valid charitable bequest and not void for uncertainty.

"Schools of learning, free schools, and scholars in universities," are among the charities enumerated in the Statute of Elizabeth; and no trusts have been more constantly and uniformly upheld as charitable than those for the establishment or support of schools and colleges. Perry on Trusts, sect. 700. That the gift "for the purpose of founding an institution for the education of youth in St. Louis County, Missouri," to be

managed by a board of trustees, is sufficiently definite, is shown by the decisions of this court in *Perin* v. *Carey*, and *Ould* v. *Washington Hospital*, above cited, as well as by that of the House of Lords in *Dundee Magistrates* v. *Morris*, 3 Macq. 134.

The law of Missouri, as declared by the Supreme Court of that State, sustains the validity of this gift. In *Chambers* v. *St. Louis*, 29 Mo. 543, a devise and bequest to the city of St. Louis, in trust "to be and constitute a fund to furnish relief to all poor emigrants and travellers coming to St. Louis on their way *bona fide* to settle in the West," which was objected to for indefiniteness in the object, as well as for want of capacity in the trustee to take, was held to be valid. And in *Schmidt* v. *Hess*, 60 id. 591, a grant of a parcel of land to the Lutheran Church for a burial ground was held to be a valid charitable gift, which equity would execute by compelling a conveyance to the trustees of a church proved to be the church intended by the testator, although it was not incorporated at the time of the gift. We have been referred to nothing having any tendency to show that the law of Arkansas, in which the lands granted lie, is different.

The money paid and the lands conveyed by Horner to Allen stand charged in the hands of Allen and his executors with the same charitable trust to which they were subject in the hands of Horner.

Steps to organize such an institution as is described in the deeds may be taken either by the Attorney-General or other public officer of the State, or by individuals. Whenever an institute for the education of youth in St. Louis shall have been incorporated and shall claim the property, it will then be a matter for judicial determination in the proper tribunal whether it meets the requirements of the gift. The only question now presented is of the validity of the gift as against the donor's heirs at law and next of kin.

Decree affirmed.

JONES v. HABERSHAM.

1. In a will containing many legacies, bequests, and devises, each present and immediate in form, to individuals and to charitable institutions, a clause expressing a wish and direction that none of the legacies, bequests, or devises "shall be executed or take effect until" a certain memorial hall (in fact nearly finished at the time of the execution of the will and of the testator's death) on land previously conveyed by the testator in trust, "shall be completed and entirely paid for out of my estate," does not suspend the vesting, but only the payment and carrying out of the various legacies, bequests, and devises.
2. Section 2419 of the Code of Georgia of 1873 does not invalidate a charitable devise contained in a will executed within ninety days before the testator's death, unless he leaves a wife or child or descendants of a child.
3. The validity of a charitable devise as against the heir at law depends upon the law of the State where the land lies.
4. The validity of a charitable bequest as against the next of kin depends upon the law of the State of the testator's domicile.
5. The law of charities is fully adopted in Georgia, as far as is compatible with a free government where no royal prerogative is exercised.
6. A parcel of land, with buildings thereon, was devised to the trustees of the Independent Presbyterian Church in Savannah, an incorporated religious society, "upon the following terms and conditions, and not otherwise:" 1st. That the trustees should appropriate annually out of the rents and profits the sum of $1,000 "to one or more Presbyterian or Congregational Churches in the State of Georgia in such destitute and needy localities as the proper officers of said Independent Presbyterian Church may select, so as to promote the cause of religion among the poor and feeble churches of the State." 2d. That the trustees should not materially alter the pulpit or galleries of the present church edifice, or sell the lot on which the Sabbath-school room of the church stood. 3d. That the trustees should keep in order the burial place of the testator, which he devised to them for that purpose. *Held*, that under the Code of Georgia of 1873, sect. 3157, the charitable purposes named in the first and third conditions were good charitable uses, sufficiently defined; that the trustees were capable of taking the devise, and that its validity was not impaired by the conditions subsequent.
7. A devise to a society incorporated "for the relief of distressed widows and the schooling and maintaining of poor children," of buildings and land, to "use and appropriate the rents and profits for the support of the school and charities of said institution, without said lot being at any time liable for the debts or contracts of said society," is a good charitable devise.
8. A devise to a society incorporated "for the relief of indigent widows and orphans in the city of Savannah," of buildings and land, "the rents and profits to be appropriated to the benevolent purposes of said society," is a good charitable devise.
9. The rule against perpetuities does not apply to charities; and if a devise is made to one charity in the first instance, and then over, upon a contingency

which may not take place within the limit of that rule, to another charity, the limitation over to the second charity is good.

10. Restrictions imposed by the charter of a corporation upon the amount of property that it may hold cannot be taken advantage of collaterally by private persons, but only in a direct proceeding by the State.

11. The provision of the Constitution of Georgia of 1868, which declares that "the General Assembly shall have no power to grant corporate powers and privileges to private companies" (with certain exceptions), "but it shall prescribe by law the manner in which such powers shall be exercised by the courts," does not take away from the General Assembly the power to amend the charters of existing corporations by modifying or enlarging their powers.

12. A devise to a historical society of a house containing a collection of books, documents, and works of art, in trust to keep and preserve the same, with the collection therein, and other books and works of art to be purchased by the officers of the society out of the income of a fund bequeathed by the devisor for the purpose, "as a public edifice for a library and academy of arts and sciences," and "to be open for the use of the public" on such terms and under such reasonable regulations as the society may prescribe, is a good charitable devise, and is not invalidated by a requirement to place and keep over the entrance a marble slab with the name of the testator engraved thereon; and if the society is incapable of executing the trust, a court of equity, in the exercise of its ordinary jurisdiction, and under sect. 3195 of the Code of Georgia of 1873, may appoint a new trustee.

13. A devise and bequest in trust for the building, endowment, and maintenance of "a hospital for females within the city of Savannah, on a permanent basis, into which sick and indigent females are to be admitted and cared for in such manner and on such terms as may be defined and prescribed by" certain directresses named and their associates, who are to obtain an act of incorporation for the purpose, is a valid charitable devise and bequest, although no time is limited for the erection of the building or the obtaining of the charter.

14. A bequest "to the first Christian church erected or to be erected in the village of Telfairville in Burke County, or to such persons as may become trustees of the same," is a good charitable bequest.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia.

The case is fully stated in the opinion of the court.

The case was argued by *Mr. William W. Montgomery* for the appellants, and by *Mr. Alexander R. Lawton* and *Mr. Walter S. Chisholm*, with whom was *Mr. Charles C. Jones, Jr.*, for the appellees.

MR. JUSTICE GRAY delivered the opinion of the court.

This is a bill in equity, by the heirs at law and next of kin of Miss Mary Telfair of Savannah, against the executors of her

will and the devisees and legatees named therein, to have the devises and bequests adjudged void and a resulting trust declared in favor of the plaintiffs. The will, which was executed the day before the testatrix died, and was afterwards admitted to probate in the court of appropriate jurisdiction of the State of Georgia, disposed of property amounting to more than $650,000, contained many devises and bequests to individuals and to charitable objects, and appointed the executors of the will trustees under its provisions. The defendants filed a general demurrer. The opinion delivered by Mr. Justice Bradley in the Circuit Court, sustaining the demurrer and dismissing the bill, is reported in 3 Woods, 443.

The plaintiffs, in the first place, contend that by the twenty-second clause of the will all the devises and bequests, as well those to private persons as those for charitable purposes, are brought within the rule against perpetuities, by which every devise or bequest is void which may by possibility not take effect within a life or lives in being and twenty-one years afterwards. That clause is as follows: —

"Twenty-second. It is my wish, and I hereby so direct, that none of the legacies, bequests, and devises in any of the clauses of this my will shall be executed or take effect until the building and other improvements on the lot on the corner of Gaston and Whittaker Streets, and known as the Hodgson Memorial Hall, which I have conveyed in trust to the Georgia Historical Society, shall be completed and entirely paid for out of my estate."

The bill, which was filed nearly four years after the death of the testatrix, alleges, and the demurrer admits, that the building and other improvements referred to were in course of construction at the time of her death, but were not completed until many months thereafter, but whether they were yet entirely paid for the plaintiffs were not certainly informed, and that, if not paid for, it was the only debt known to them, now existing against the estate.

Reading the twenty-second clause in connection with the other parts of the will, and in the light of the attending facts, it is quite clear that the words "take effect" are used by the testatrix as synonymous with or equivalent to the word "exe-

cuted," with which they are coupled, and not as signifying that the devises and bequests shall not vest immediately, but only that they shall not be paid or carried out until the debt contracted by the testatrix for the construction of the Hodgson Memorial Hall shall have been paid out of her estate. Each devise and bequest is present and immediate in form, introduced by the words "I give, devise, and bequeath." The bill shows that the building and improvements referred to were, at the time of the death of the testatrix, in the course of construction, and so far advanced that they were actually completed within some months afterwards, so that the probable cost must have been capable of estimation at the time of the making of the will. The twenty-second clause is but a declaration of what the law would require, that the debt of the testatrix for the construction of the memorial hall must be first paid out of her estate before her devisees and legatees receive any benefit therefrom.

The next objection, which touches all the devises to charitable purposes, is based on the following provision of the Code of Georgia of 1873: —

"SECT. 2419. No person leaving a wife or child, or descendants of child, shall by will devise more than one-third of his estate to any charitable, religious, educational, or civil institution, to the exclusion of such wife or child; and in all cases the will containing such devise shall be executed at least ninety days before the death of the testator, or such devise shall be void."

The plaintiffs contend that the latter part of this section applies to every will containing a charitable devise, whether the testator does or does not leave a wife or child or the descendants of a child; and that therefore, although this testatrix left no issue and had never been married, yet the will having been executed less than ninety days before her death, the charitable devises contained therein are void.

In support of this position reference is made to cases in the courts of New York and Pennsylvania. *Harris* v. *Slaght*, 46 Barb. (N. Y.) 470; S. C. *nom. Harris* v. *American Bible Society*, 2 Abbott, App. Dec. (N. Y.) 816; *Lefevre* v. *Lefevre*, 59 N. Y. 434; *Price* v. *Maxwell*, 28 Pa. St. 23; *McLean* v.

Wade, 41 id. 266; *Miller* v. *Porter*, 53 id. 292; *Rhymer's Appeal*, 93 id. 142. But the statutes under which those cases were decided were quite different from that of Georgia.

The enactment in New York formed part of an act for the incorporation of charitable societies, and is as follows: "Any corporation formed under this act shall be capable of taking, holding, or receiving any property, real or personal, by virtue of any devise or bequest contained in any last will or testament of any person whatsoever, the clear annual income of which devise or bequest shall not exceed the sum of ten thousand dollars: *Provided*, no person leaving a wife, or child, or parent, shall devise or bequeath to such institution or corporation more than one-fourth of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of such one-fourth; and no such devise or bequest shall be valid in any will which shall not have been made and executed at least two months before the death of the testator." Statute of N. Y. of 1848, c. 319, sect. 6; 2 N. Y. Rev. Stat. (ed. 1859), c. 18, tit. 7, sect. 6. The leading clause of that section, to which the last clause of the same section was held to relate, and which is wholly omitted in the Georgia statute, spoke of devises and bequests to charitable corporations "contained in any last will or testament of any person whatsoever."

The provision of the corresponding statute of Pennsylvania was still plainer; for it did not mention wife or child at all, but enacted in the most positive words that "no estate, real or personal, shall hereafter be bequeathed, devised, or conveyed to any body politic, or to any person, in trust for religious or charitable uses, except the same be done by deed or will, attested by two credible, and, at the time, disinterested witnesses, at least one calendar month before the decease of the testator or alienor; and all dispositions of property contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin or heirs, according to law: *Provided*, that every disposition of property within said period, *bona fide* made for a fair valuable consideration, shall not be hereby avoided." Statute of Penn. of 1855, c. 347, sect. 11; Purdon's Digest (10th ed.), 208.

But in the provision on which the appellants rely, which is inserted in the chapter on wills of the Code of Georgia, and is the only provision as to charitable devises contained in that chapter, the leading clause is limited to the will of a person, leaving a wife or child or descendants of a child, containing a devise to a charitable institution to the exclusion of such wife or child; and the words in the subsequent clause, "in all cases the will containing such devise," naturally, if not necessarily, refer to a will containing a devise to such an institution by a person leaving a wife or issue. The provision has been so construed by the Supreme Court of Georgia in a case decided in 1867, and again in 1878 in the case of this very will. *Reynolds* v. *Bristow*, 37 Ga. 283; *Wetter* v. *Habersham*, 60 id. 193, 194, 203. It is suggested by the learned counsel for the appellants that what was said upon this point in each of those cases was *obiter dictum*, because the question at issue was not of the construction or effect of the will, but only whether it should be admitted to probate. But the reports clearly show that the court considered that the question whether the will was illegal and void, so far as regarded the charitable devises, because in contravention of this statute, was presented for adjudication upon the offer of the whole will for probate.

The separate objections taken to the several charitable devises and bequests remain to be considered.

According to the uniform course of the decisions of this court, the validity of these devises, as against the heirs at law, depends upon the law of the State in which the lands lie, and the validity of the bequests, as against the next of kin, upon the law of the State in which the testatrix had her domicile. *Vidal* v. *Girard*, 2 How. 127; *Wheeler* v. *Smith*, 9 id. 55; *McDonogh* v. *Murdoch*, 15 id. 367; *Fontain* v. *Ravenel*, 17 id. 369, 384, 394; *Perin* v. *Carey*, 24 id. 465; *Lorings* v. *Marsh*, 6 Wall. 337; *United States* v. *Fox*, 94 U. S. 315; *Kain* v. *Gibboney*, 101 id. 362; *Russell* v. *Allen*, *ante*, p. 163.

The Code of Georgia of 1873 contains the following provisions on the subject of charitable uses: —

"SECT. 2468. A devise or bequest to a charitable use will be sustained and carried out in this State; and in all cases where there is a general intention manifested by the testator to effect a cer-

tain purpose, and the particular mode in which he directs it to be done fails from any cause, a court of chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator."

"SECT. 3155. Equity has jurisdiction to carry into effect the charitable bequest of a testator, or founder, or donor, where the same are definite and specific in their objects, and capable of being executed.

"SECT. 3156. If the specific mode of execution be for any cause impossible, and the charitable intent be still manifest and definite, the court may, by approximation, give effect in a manner next most consonant with the specific mode prescribed.

"SECT. 3157. The following subjects are proper matters of charity for the jurisdiction of equity: 1. The relief of aged, impotent, diseased, or poor people. 2. Every educational purpose. 3. Provisions for religious instruction or worship. 4. For the construction or repair of public works, or highways, or other public conveniences. 5. The promotion of any craft or persons engaging therein. 6. For the redemption or relief of prisoners or captives. 7. For the improvement or repair of burying-grounds or tombstones. 8. Other similar subjects, having for their object the relief of human suffering or the promotion of human civilization.

"SECT. 3158. A charity once inaugurated is always subject to the supervision and direction of a court of equity, to render effectual its purpose and object."

These provisions were evidently enacted to clear up the doubts created by previous conflicting decisions and opinions of the Supreme Court of Georgia. *Beall* v. *Fox*, 4 Ga. 404; *American Colonization Society* v. *Gartrell*, 23 id. 448; *Walker* v. *Walker*, 25 id. 420; *Beall* v. *Drane*, id. 430. They show, as was well observed by Mr. Justice Bradley in the Circuit Court, "that the law of charities is fully adopted in Georgia, as far as is compatible with a free government where no royal prerogative is exercised." 3 Woods, 469. And such has been the construction given to the corresponding sections of the Code of 1865 by the Supreme Court of the State in a well-considered judgment, in which it was held that charitable bequests, the general objects of which the testator had pointed out, or fixed any means for pointing out, were sufficiently "definite and specific in their objects, and capable of being executed,"

under the provisions of the Code and the ordinary jurisdiction of courts of chancery; and, therefore, that a bequest to a county court of a sum of money to be placed in the hands of four men, who were to give security, and lend out the principal, and pay over the interest annually to that court, "to pay for the education of poor children belonging to the county," was a good charitable bequest. *Newson* v. *Starke*, 46 Ga. 88.

In the will before us, the first of the devises to charitable uses is as follows: —

"Tenth. I hereby give, devise, and bequeath to the Trustees of the Independent Presbyterian Church of the City of Savannah all that full lot of land in the City of Savannah on the southwest corner of Broughton and Bull Streets, with the buildings and improvements thereon, to have and to hold the same on the following terms and conditions, and not otherwise, to wit: First. That the Trustees of the said Independent Church shall appropriate annually, out of the rents and profits of said lot and improvements, the sum of one thousand dollars to one or more Presbyterian or Congregational Churches in the State of Georgia, in such destitute and needy localities as the proper officers of said Independent Presbyterian Church may select, so as to promote the cause of religion among the poor and feeble churches of the State. Second. This gift and devise is made on the further condition that neither the trustees nor any other officer of said Independent Presbyterian Church will have or authorize any material alteration or change made in the pulpit or galleries of the present church edifice on the corner of Bull and South Broad Streets, but will permit the same to remain substantially as they are, subject only to proper repairs and improvements; nor shall they sell or alien the lot on which the Sabbath school-room of said church now stands, but shall hold the same to be improved in such manner as the trustees or pew-holders may direct. Third. Upon the further condition that the Trustees of said Independent Presbyterian Church will keep in good order, and have thoroughly cleaned up every spring and autumn, my lot in the cemetery of Bonaventure, and that no interment or burial of any person shall ever take place either in the vault or within the enclosure of said lot; and for the purpose of having the same protected and cared for, I hereby give, devise, and bequeath my said lot in the Bonaventure Cemetery to the Trustees of the Independent Presbyterian Church and their successors."

The act of the legislature of Georgia of the 8th of December, 1806, incorporating the Trustees of the Presbyterian Church of the City of Savannah (whose name, by a subsequent act of the 16th of May, 1821, has been changed to that by which they are called in the will), provides, in sect. 2, that they "and their successors in office shall be invested with all manner of property, real and personal, all moneys due and to grow due, donations, gifts, grants, privileges, and immunities whatsoever, which shall or may belong to said Presbyterian Church at the time of the passing of this act, or which shall or may at any time or times hereafter be granted, given, conveyed, or transferred to them, or their successors in office, to have and to hold the same to the said trustees, and their successors in office, to the only proper use, benefit, and behoof of the said church forever;" in sect. 4, that "nothing herein contained shall be construed to vest in the said trustees any right or title to any estate or property whatsoever, real or personal, other than such as doth, or may rightfully and lawfully, belong to the said Presbyterian Church, or congregation, hereby made a body corporate;" and in sect. 5, that "it shall not be lawful for said trustees, or their successors in office, at any time or times hereafter, to grant, bargain, sell, alien, or convey any real estate whatsoever, belonging to the said church, to any person or persons, under any pretence or upon any consideration whatsoever, so as to dispose of the fee-simple thereof."

It is objected that this corporation is not empowered under its charter to accept and administer this charity. But it is a novel proposition, as inconsistent with the rules of law as it is with the dictates of religion, that a Christian church or religious society cannot receive and distribute money to poor churches of its own denomination so as to promote the cause of religion in the State in which it is established.

To hold this gift to be too indefinite and uncertain would be to disregard the elementary principles of the law of charitable uses. The appropriation of a certain sum annually to one or more churches of a certain denomination in such destitute and needy localities as the trustees may select, so as to promote the cause of religion among the poor and feeble churches of the State, describes the general nature of the charitable purpose,

while leaving the selection of the particular objects to the trustees, and is a good charitable use, sufficiently defined. *Bartlet* v. *King*, 12 Mass. 537; *Going* v. *Emery*, 16 Pick. (Mass.) 107; *North Adams Universalist Society* v. *Fitch*, 8 Gray (Mass.), 421.

The other objections to the validity of this devise are equally unavailing. The condition that no material alteration or change, but only proper repairs and improvements, shall be made in the pulpit or galleries of the present church (even if illegal, which we see no reason for supposing), is a condition subsequent, relating to the care and use of the property after the gift shall have vested in the devisee, and cannot therefore affect the original validity of the gift.

The condition that the trustees shall not alienate the land on which the school-room stands is also a condition subsequent, and is in accordance with the fifth section of their charter, and with the general law upon the subject. It will not prevent a court of chancery from permitting, in case of necessity arising from unforeseen change of circumstances, the sale of the land and the application of the proceeds to the purposes of the trust. Tudor on Charitable Trusts (2d ed.) 298; *Stanley* v. *Colt*, 5 Wall. 119, 169.

The condition as to the care and keeping of the tomb or burial-place of the testatrix is likewise a condition subsequent, and, even if invalid, would not defeat the charitable gift. *Giles* v. *Boston Fatherless & Widows' Society*, 10 Allen (Mass.), 355. In England there has been a difference of opinion upon the question whether the maintenance and repair of the tomb or monument of the donor is a good charitable use. Down to the time of the American Revolution, as by the civil law, it appears to have been held that it was. 3 Inst. 202; *Masters* v. *Masters*, 1 P. Wms. 421, 423, and note; *Durour* v. *Motteux*, 1 Ves. Sen. 320; *Gravenor* v. *Hallum*, Ambl. 643; Boyle on Charities, 45–51; Justinian's Institutes, lib. 2, tit. 1, sects. 8, 9; Dig. 11, 7, 2, 5; 47, 12, 3, 2. According to the later English cases, it is not. *Doe* v. *Pitcher*, 3 M. & S. 407; *Same* v. *Same*, 6 Taunt. 359; S. C. 2 Marsh. 61; *Willis* v. *Brown*, 2 Jur. 987; *Hoare* v. *Osborne*, Law Rep. 1 Eq. 585; *Fiske* v. *Attorney-General*, Law Rep. 4 Eq. 521; *In re Birkett*, 9 Ch. D. 576. See

also *Dexter* v. *Gardner*, 7 Allen (Mass.), 243, 247. But it is unnecessary to examine and weigh these conflicting authorities, or to determine whether the devise of the burial-place of the testatrix, and the direction to keep it in good order, could be upheld in the absence of local statute, because they are clearly valid under the Code of Georgia, which enumerates among charitable uses "the improvement or repair of burying-grounds or tombstones." Code of Georgia of 1873, sect. 3157, cl. 7.

The eleventh clause of the will contains a devise to the Union Society of Savannah of a parcel of land in that city, with the buildings and improvements thereon, "but on the express condition that said society shall not sell or alienate said lot, but shall use and appropriate the rents and profits of the same for the support of the school and charities of said institution, without said lot being at any time liable for the debts or contracts of said society." The Union Society was incorporated by a statute of the 14th of August, 1786, "for the relief of distressed widows and the schooling and maintaining of poor children."

The twelfth clause devises to the Widows' Society of Savannah another parcel of land in that city, "on which the improvements now consist of four brick tenement buildings, the rents and profits of the same to be appropriated to the benevolent purposes of said society, but this devise is made on condition the said Savannah Widows' Society shall not sell or alienate said lot or improvements, nor hold the same subject to the debts, contracts, or liabilities of said society." The Widows' Society was incorporated, as stated in the title and repeated in the body of its charter granted in 1837, "for the relief of indigent widows and orphans in the City of Savannah."

"The relief of aged, impotent, and poor persons" is within the very words of the Statute of 43 Eliz. c. 4, sect. 1, and of the Code of Georgia of 1873, sect. 3157; and all educational purposes are within the terms of that code, and within the scope and principle of the Statute of Elizabeth. *Russell* v. *Allen*, *ante*, p. 163. The fact that the gift to the Widows' Society is directed "to be appropriated to the benevolent purposes of said society" does not affect its validity, because the charter of the society shows that all its purposes are charitable,

in the legal sense. It is only when a gift might be applied to benevolent purposes which are not charitable in that sense, that the gift fails. *Saltonstall* v. *Sanders*, 11 Allen (Mass.), 446; *Suter* v. *Hilliard*, 132 Mass. 412; *De Camp* v. *Dobbins*, 29 N. J. Eq. 36; *Adye* v. *Smith*, 44 Conn. 60; *In re Jarman's Estate*, 8 Ch. D. 584. The conditions subsequent have no greater effect than the corresponding conditions in the tenth clause, already considered.

The next clause of the will contains a provision applicable to the tenth, eleventh, and twelfth clauses, and is as follows: —

"Thirteenth. Should either one or more of the corporate bodies or institutions named in the preceding items of my will attempt to sell, alienate, or otherwise dispose of the property and estate therein devised, contrary to the terms and conditions therein set forth, or should there be any levy on the same to satisfy the debts of said corporation, then I hereby direct my executors or legal representatives to repossess and enter upon said property or estate as to which the conditions may be so broken or violated, and in that event I do hereby give and devise the said property so entered upon and repossessed unto the Savannah Female Orphan Asylum."

There is nothing in this clause by which the heirs at law or next of kin can be benefited, in any possible view. If the conditions against voluntary alienation and levy of execution are invalid, the previous devises stand good. If those conditions are valid, the devise over to the Savannah Female Orphan Asylum, an undoubted charity, will take effect; for as the estate is no more perpetual in two successive charities than in one charity, and as the rule against perpetuities does not apply to charities, it follows that if a gift is made to one charity in the first instance, and then over to another charity upon the happening of a contingency which may or may not take place within the limit of that rule, the limitation over to the second charity is good. *Christ's Hospital* v. *Grainger*, 16 Sim. 83, 100; 1 Macn. & Gord. 460; 1 Hall & Twells, 533; *McDonogh* v. *Murdoch*, 15 How. 367, 412, 415; *Russell* v. *Allen*, *ante*, p. 163.

The fourteenth clause of the will contains a devise and be-

quest to the Georgia Historical Society to establish a public library and museum, and is as follows: —

"Fourteenth. I hereby give, devise, and bequeath to the Georgia Historical Society and its successors all that lot or parcel of land, with the buildings and improvements thereon, fronting on St. James Square, in the City of Savannah, and running back to Jefferson Street, known in the plan of said city as lot letter N, Heathcote Ward, the same having been for many years past the residence of my family, together with all my books, papers, documents, pictures, statuary, and works of art, or having relation to art or science, and all the furniture of every description in the dwelling-house and on the premises (except bedding and table service, such as china, crockery, glass, cutlery, silver, plate, and linen), and all fixtures and attachments to the same; to have and to hold the said lot and improvements, books, pictures, statuary, furniture, and fixtures to the said Georgia Historical Society and its successors, in special trust, to keep and preserve the same as a public edifice for a library and academy of arts and sciences, in which the books, pictures, and works of art herein bequeathed, and such others as may be purchased out of the income, rents, and profits of the bequest hereinafter made for that purpose, shall be permanently kept and cared for, to be open for the use of the public on such terms and under such reasonable regulations as the said Georgia Historical Society may from time to time prescribe; but this devise and bequest is made upon condition that the Georgia Historical Society shall cause to be placed and kept, over and against the front porch or entrance of the main building on said lot, a marble slab or tablet, on which shall be cut or engraved the following words, to wit: TELFAIR ACADEMY OF ARTS AND SCIENCES, the word 'Telfair' being in larger letters and occupying a separate line above the other words; and on the further condition that no part of the buildings shall ever be occupied as a private residence or rented out for money, and none but a janitor and such other persons as may be employed to manage and take care of the premises shall occupy or reside in or upon the same, and that no part of the same shall be used for public meetings or exhibitions, or for eating, drinking, or smoking, and that no part of the lot or improvements shall ever be sold, alienated, or encumbered, but the same shall be preserved for the purposes herein set forth. And it is my wish that whenever the walls of the building shall require renovating by paint or otherwise, the present color and design shall be adhered to as far as

practicable. For the purpose of providing more effectually for the accomplishments of the objects contemplated in this item or clause of my will, I hereby give, devise, and bequeath to the Georgia Historical Society and its successors one thousand shares of the capital stock of the Augusta and Savannah Railroad of the State of Georgia, in special trust, to apply the dividends, income, rents, and profits arising from the same, to the repairs and maintenance of said buildings and premises, and the payment of all expenses attendant upon the management and care of the institution herein provided for, and then to apply the remaining income, rents, and profits in adding to the library, and such works of art and science as the proper officers of the Georgia Historical Society may select, and in the preservation and proper use of the same, so as to carry into effect in good faith the objects of this devise and bequest."

The Georgia Historical Society was incorporated by a statute of the 19th of December, 1839, the preamble of which recites that "the members of a society instituted in the City of Savannah for the purpose of collecting, preserving, and diffusing information relating to the history of the State of Georgia in particular, and of American history generally, have applied for an act of incorporation." The first section makes them a corporation with the usual powers, and especially "to purchase, take, receive, hold, and enjoy, to them and their successors, any goods and chattels, lands and tenements, and to sell, lease, or otherwise dispose of the same, or any part thereof, at their will and pleasure: *Provided*, that the clear annual income of such real and personal estate shall not exceed the sum of five thousand dollars: *And provided, also*, that the funds of the said corporation shall be used and appropriated to the purposes stated in the preamble of this act, and those only." And the fourth section declares that the act of incorporation shall be a public act, "and shall be construed benignly and favorably for every beneficial purpose therein intended."

It is stated in the bill, and admitted by the demurrer, that the net income of the Georgia Historical Society from property held by it at the time of the death of the testatrix was between $3,000 and $4,000, and that the income of the property now bequeathed to it will add $7,000 to that income. It is argued for the appellants that because the effect

of the gift will be to increase the property of the corporation to double the amount which the corporation is allowed by the proviso in the first section of its charter to hold, the whole gift is void.

But there are two conclusive answers to this argument: 1st. Restrictions imposed by the charter of a corporation upon the amount of property that it may hold cannot be taken advantage of collaterally by private persons, but only in a direct proceeding by the State which created it. *Runyan* v. *Coster*, 14 Pet. 122, 131; *Smith* v. *Sheeley*, 12 Wall. 358, 361; *Bogardus* v. *Trinity Church*, 4 Sandf. (N. Y.) Ch. 633, 758; *De Camp* v. *Dobbins*, 29 N. J. Eq. 36; *Davis* v. *Old Colony Railroad Co.*, 131 Mass. 258, 273.

2d. By an act of amendment of the 28th of October, 1870, the provisos in the first section of the original charter are repealed. It is contended that the act of 1870 is unconstitutional and void, as being a grant by the legislature of corporate powers and privileges, in contravention of this provision in the Constitution of the State: "The General Assembly shall have no power to grant corporate powers and privileges to private companies, except to banking, insurance, railroad, canal, navigation, mining, express, lumber, manufacturing, and telegraph companies; nor to make or change election precincts; nor to establish bridges or ferries; nor to change names or legitimate children; but it shall prescribe by law the manner in which such powers shall be exercised by the courts." Constitution of Georgia of 1868, art. 3, sect. 6, § 5; Code of 1873, sect. 5068. But the words "corporate powers and privileges," as here used, signify the corporate franchise, the aggregate powers and privileges which constitute a corporation, not every separate power and privilege which may be conferred upon a corporate body. The object is to take away from the legislature, and to vest in the courts, under its direction, for the future, the creation of private corporations for literary, religious, charitable, or other purposes, except those specially excepted; but not to prevent the legislature from amending the charters of corporations already existing, and modifying or enlarging their powers, either by repealing former restrictions or otherwise. The act of 1870 is therefore constitutional and valid.

That a devise and bequest "to keep and preserve as a public edifice" a house containing a library and an academy or museum of works of art and science, "to be open for the use of the public" on such terms and under such reasonable regulations as the trustees may from time to time prescribe, is a valid charity, cannot be doubted. *British Museum* v. *White*, 2 Sim. & Stu. 594; *Drury* v. *Natick*, 10 Allen (Mass.), 169; *Donohugh's Appeal*, 86 Pa. St. 306. The directions tending to perpetuate the memory of the founder do not impair its public character or its legal validity. In the cases of *Thomson* v. *Shakespeare*, H. R. V. Johns. 612, and 1 D., F. & J. 399, and of *Carne* v. *Long*, 2 id. 75, on which the appellants rely, the gifts failed because not exclusively devoted to a public charitable use, the definition in the one case including purposes that might not be charitable, and the bequest in the other being to a private library established for the benefit of the subscribers alone. See *Beaumont* v. *Oliveira*, Law Rep. 4 Ch. 309, 314, 315.

A corporation may hold and execute a trust for charitable objects in accord with or tending to promote the purposes of its creation, although such as it might not, by its charter or by general laws, have authority itself to establish or to spend its corporate funds for. A city, for instance, may take a devise in trust to maintain a college, an orphan school, or an asylum. *Vidal* v. *Girard*, 2 How. 127; *McDonogh* v. *Murdoch*, 15 id. 367; *Perin* v. *Carey*, 24 id. 465. There is some ground for holding that the objects of a historical society would be promoted by administering a devise and bequest to maintain for the public instruction and benefit a house containing a collection of books, documents, and works of art, with other such books and works to be selected by the officers of the society and purchased out of the surplus income; and that the purposes of the trust are, in the words of Mr. Justice Story in *Vidal* v. *Girard*, 2 id. 189, "germane to the objects of the incorporation," and "relate to matters which will promote, and aid, and perfect those objects."

But if any doubt remains of the capacity of the Georgia Historical Society to assume and execute those charitable trusts, it would be within the ordinary jurisdiction of a court

of equity to appoint other trustees in its stead, according to the maxim, expressly affirmed in the Code of Georgia, that a trust shall never fail for the want of a trustee. *Reeve* v. *Attorney-General*, 3 Hare, 191; *Winslow* v. *Cummings*, 3 Cush. (Mass.) 358; Code of Georgia of 1873, sect. 3195.

The residuary clause of the will disposes of real and personal estate to the amount of $300,000, and is as follows: —

"Twenty-first. All the residue of my estate, of whatever the same may consist, real, personal, and mixed, and wherever situated, I hereby give, devise, and bequeath to my executors hereinafter named, and to the survivor of them, and to the successors in this trust of said survivor, in trust, to use and appropriate the proceeds arising from the same to the building and erection and endowment of a hospital for females within the City of Savannah, on a permanent basis, into which sick and indigent females are to be admitted and cared for in such manner and on such terms as may be defined and prescribed by the trustees or directresses provided for in this item or clause in my will. The income, rents, and profits of such portion of the residuum of my estate as may not be expended in the building, erection, and furnishing said hospital shall be annually appropriated to the support and maintenance of the same. My desire and request is that a thoroughly convenient hospital, of moderate dimensions, suited to the wants of the City of Savannah, and capable of enlargement if necessity should require, may be built and erected, with no unnecessary display connected with it. And I do hereby nominate, as the first trustees, managers, or directresses of said hospital, Mrs. Louisa F. Gilmer, Sarah Owens, Mary Elliott (formerly Habersham), Susan Mann, Florence Bourquin, Eva West, and Eliza Chisolm, all of Savannah, Georgia, and do request and instruct my executors to advise and consult with the ladies named as to the construction, arrangement, and furnishing of said hospital. It is further my wish and desire, and I do hereby request, that a suitable and proper act of incorporation for said hospital shall be obtained from such tribunal in the State of Georgia as may have jurisdiction in the premises, to be called and known as the 'Telfair Hospital for Females,' with the ladies above named, or such of them as may consent to serve, and such others as they may apply for to be associated with them, as the first trustees, managers, or directresses under said act of incorporation, with power to fill any vacancies that occur in their number. And for the purpose of accomplishing the objects contemplated in this item or clause of my

will, I do hereby authorize and empower my executors, or the survivor of them, to sell and convey all or any portion of the real estate, or any interest in the same, which I may have or be entitled to, and not given or devised in any of the previous items or clauses of this my will, using their discretion as to private or public sales, and as to whether and at what time such sales shall be made."

That this devise and bequest to establish a hospital for sick and indigent females in the City of Savannah is sufficiently definite, and that its validity is not impaired by the provision of the will requiring an act of incorporation to be obtained, are clearly settled by the cases of *Inglis* v. *Sailor's Snug Harbor*, 3 Pet. 99; *Ould* v. *Washington Hospital*, 95 U. S. 303; and *Russell* v. *Allen, ante*, p. 163.

The bequest, in the twenty-third clause of the will, of $1,000 "to the first Christian church erected or to be erected in the village of Telfairville in Burke County, or to such persons as may become trustees of the same," is supported by the same authorities, and is directly within the decisions of Lord Thurlow in *Attorney-General* v. *Bishop of Chester*, 1 Bro. Ch. 444, of Sir John Copley, Master of the Rolls (afterwards Lord Lyndhurst), in *Society for the Propagation of the Gospel* v. *Attorney-General*, 3 Russ. 142, and of Lord Hatherley in *Sinnett* v. *Herbert*, Law Rep. 7 Ch. 232. See also *Cumming* v. *Reid Memorial Church*, 64 Ga. 105.

The result is that all the devises and bequests contained in Miss Telfair's will are valid as against her heirs at law and next of kin.

Decree affirmed.

ATLANTIC WORKS v. BRADY.

BRADY v. ATLANTIC WORKS.

1. Letters-patent granted to Edwin L. Brady, Dec. 17, 1867, for an improved dredge-boat for excavating rivers, are invalid for want of novelty and invention.
2. The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. It was never their object to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures.
3. Although letters-patent are not set up by way of defence in an answer, yet if the invention patented thereby is afterwards put into actual use, their date will be evidence of that of the invention on a question of priority between different parties.
4. One person receiving from another a full and accurate description of a useful improvement cannot appropriate it to himself; and letters-patent obtained by him therefor are void.

APPEALS from the Circuit Court of the United States for the District of Massachusetts.

The case is stated in the opinion of the court.

Mr. William A. Abbott and *Mr. Albert A. Abbott* for Brady.

Mr. Assistant Attorney-General Maury, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case arises upon a bill in equity filed by Edwin L. Brady against The Atlantic Works, a corporation of Massachusetts, having workshops and a place of business in Boston, praying for an account of profits for building a dredge-boat in violation of certain letters-patent granted to the complainant bearing date Dec. 17, 1867, and for an injunction to restrain the defendants from making, using, or selling any dredge-boat in violation of said letters-patent. The bill was filed on the 9th of April, 1868, and had annexed thereto a copy of the patent alleged to be infringed. The following are the material parts of the specification: —

"The excavator consists of a strong boat propelled by one or two propellers placed in the stern of the boat. I prefer two pro-

pellers, as affording greater power and rendering the boat more manageable in steering in crooked channels. This propeller is driven in the ordinary manner by steam-engines of ordinary construction. Near the bow of the boat I place another steam-engine, driving what I call the 'mud-fan,' which projects from and in front of the bow of the boat. This is formed by a set of revolving blades shown at A, turned like the propellers, by a shaft passing through a stuffing-box, D. The blades are shaped somewhat like those of a propeller, but they are sharper on their fronts and less inclined on their faces. These blades should extend, say, two feet below the bottom of the boat, and their object is by their rapid revolution to displace the sand and mud on the bottom, and stirring them up, to mix them with the water so that they may be carried off by the current.

"The motion of the 'mud-fan' tends to draw forward the boat, assisting the propellers.

"All the engines may be driven by one set of boilers, F, placed amidships. In order that the 'mud-fan' may be brought in contact with the bottom, I construct the boat with a series of water-tight compartments, E, placed in the bow and stern, and on each side of the centre amidships, into which the water may be permitted to flow through pipes so as to sink the vessel to the required depth; the compartments being so placed and proportioned that the vessel shall sink with an even keel, by which the effective action of the 'mud-fan,' the propellers, and the steering apparatus is preserved, the boat being manageable at any depth. A large pump, B, driven by the engine, is connected by pipes with all the compartments, so that the water may be pumped out when necessary to raise the boat.

"I am aware that boats have been constructed with compartments to be filled with water, to sink the dredging mechanism to the bottom, by loading the end of the boat in which such mechanism is placed; but this construction is subject to the disadvantage of requiring more complicated machinery for dredging, in order that it may be accommodated to the inclination of the boat, and to the further disadvantage that the boats thus inclined are comparatively unmanageable.

"What I claim as my invention, and desire to secure by letters-patent, is:—

"1. A dredging-boat, constructed with a series of water-tight compartments, so proportioned and arranged that, as they are filled with water, the boat shall preserve an even keel, and the

dredging mechanism be brought into action without any adjusting devices, substantially as set forth.

"2. The combination of the 'mud-fan' attached to a rigid shaft, and a boat containing a series of water-tight compartments, E, so adjusted as to cause the boat to settle on an even keel as the compartments are filled with water, and a pump, B, for exhausting the water from all the compartments, substantially as set forth."

The defendants, in their answer, denied the validity of the patent, and denied infringement of any valid patent of the complainant. They then stated the circumstances under which they came to construct the dredge-boat complained of; namely, that in October, 1867, the government of the United States advertised for proposals for building a dredge-boat for the mouth of the Mississippi River, according to certain plans and specifications; that the defendants, being manufacturers and builders of marine engines and steamboats, examined the plans and specifications, and made proposals for building the boat according to the same; which were accepted; and they at once began the construction of the boat and completed it under the inspection and supervision of a United States officer, in conformity with the stipulations; and the boat went in charge of said officer to the mouth of the Mississippi River; that the said plans and specifications were made and furnished by General McAlester, of the engineer corps of the United States, for the use of the government, and were the result of his own study, observations, and experience, and that so far as they were original he was the author of them. They further alleged by their answer (as amended) as follows: "That the plans and specifications by which the said dredge-boat was constructed were not, and the said dredge-boat itself was not a new invention, or novel and original; but the same, and the principle of said dredge-boat, had been substantially known and publicly used before, to wit, at New Orleans, on the mouth of the Mississippi River, in the year 1859, in the steam dredge-boat 'Enoch Train,' by Charles H. Hyde, by Thomas G. Mackie, and William A. Hyde, copartners, under the firm of Hyde & Mackie, and by Henry Wright, and had also been used and applied in the construction of light-draft monitors, so called, built by the United States government during the late rebel-

lion, and long prior to the alleged patent or invention of the said Brady and the dates of his patent or caveat, and one of which said light-draft monitors was built at the works of these defendants."

The answer further stated that in 1866 and 1867, prior to the date of Brady's alleged invention, he was acting as agent for one Tyler, in carrying out a contract with the government for the improvement of the mouth of the Mississippi River; that General McAlester was then stationed at New Orleans to supervise and inspect, on behalf of the United States, the execution of the contract; that Brady was fitting and preparing a steamboat for the purpose on a plan entirely different from that of his alleged invention; that McAlester then detailed and described to him a plan for a dredge-boat identical with that of the boat constructed by the defendants; which plan McAlester communicated to the board of engineers of the army before the date of the alleged invention by Brady; that Brady's boat was a failure, and the contract was annulled; that then Brady made drawings for a boat on the plan described to him by McAlester, and afterwards claimed to be the inventor of it, and made application for his patent, and obtained the same after the defendants had commenced work on the boat complained of.

Evidence was taken, and on a hearing before Mr. Justice Clifford, in September, 1876, a decree was made sustaining the patent, declaring that the defendants had infringed the same, and referring it to a master to take an account of the profits received by the defendants from the infringement. The master reported the sum of $6,604.82. Both parties excepted, but their exceptions were overruled, and a final decree, in accordance with the report, was rendered Oct. 9, 1878, with costs. Both parties have appealed.

The most important question, and first to be considered, is the validity of the patent.

It is obvious from reading the specification that the alleged invention consists mainly in attaching a screw (which the patentee calls a mud-fan) to the forward end of a propeller dredge-boat, provided with tanks for settling her in the water. It is operated by sinking the boat until the screw comes in contact with the mud or sand, which, by the revolution of the

screw, is thrown up and mingled with the current. The use of a series of tanks for the purpose of keeping the vessel level whilst she settles is an old contrivance long used in dry-docks, and is shown, by the evidence, to have been used in many light-draft monitors during the late war. The defendants themselves built one of these vessels, the "Casco." Mr. Edwards, the president of the Atlantic Works, in his testimony, says: "The 'Casco' was built double, leaving a water-space on each side nearly the entire length of the vessel, with an arrangement of valves for flooding the compartments at pleasure, for the purpose of sinking the vessel to the desired draft of water, and with powerful steam-pumps to pump the water out for the purpose of raising it in the water. The compartment on the side was divided into several, and one or all of them could be filled as desired. The object was to enable them to put her on an even keel, or to raise or depress one end at pleasure." The employment of their screws by propeller ships, driven stern foremost, for the removal of sand and mud accumulated at the mouths of the Mississippi, had frequently occurred years before the patentee's invention is alleged to have been made. Several French steamers, one of which was named the "Francis Arago," had used this method there prior to the year 1859. In that year the "Enoch Train," a double propeller, that is, having two screws at her stern, was used in the same way by certain contractors under the government, for dredging the mouth of the Mississippi. Mr. Hyde, one of the contractors and owners, in his testimony, describes her construction and operation as follows: —

"She was a propeller of burden between three and four hundred tons, with two propeller screws at her stern, about nine feet in diameter each; the cylinders were thirty-six inches in diameter and thirty-four inches stroke; she had one doctor engine; was fitted also with a large wrecking pump, with two low-pressure boilers; engines were also low-pressure engines. Her draft of water, in ordinary trim, with three hundred barrels of coal on board, was about thirteen feet aft, and a little less at the bows. By ordinary trim I mean the usual sailing trim. The propeller screws were one on each quarter, or each side of the stern-post. Before going to dredging on the bar, I fitted her up

with a water-tight apartment, or tank, at the stern, by a bulkhead running athwartships, say about twenty or twenty-five feet from the stern. That space was divided by a fore-and-aft bulkhead, making two water-tight compartments.

"The mode of filling the compartments was by stop-cocks in the sides of the vessel opening into the water-tight compartment; the draft of water could be increased from her natural draft of water, say thirteen feet to eighteen feet, according to the quantity of water let into the tanks. The mode of operating was by running the vessel up and down over the bar, and thus stirring up the mud with the propeller screws. When the water was too shoal for her to pass over, the stern of the vessel was turned to the bar, and she was run stern on, the engines being reversed. Whenever we got done working on the bar there was a valve in the water-tight compartments for letting the water into the hold of the vessel, from which the water was pumped out of the vessel, by the steam-pumps, and the vessel would then be left at her ordinary draft.

"*Int.* 13. Please to state how you happened to employ this mode of dredging by the 'Enoch Train.'

"*Ans.* Well, I thought it would be an effectual way of removing the mud from the bar; that by the screws coming in contact with the mud and deposit, and the revolutions of the screws about sixty times a minute, would create a current of water by which the sediment would be washed away."

The evidence of Henry Wright, the master of the "Enoch Train," under whose charge her operations were conducted, is to the same purport. He says: —

"We used to work our propellers in cutting up the mud. The operation consisted in cutting through the mud with our propellers. Sometimes we went at the mud stern foremost, sometimes sideways, and sometimes bows on. When I went to the bar at first there was about fifteen feet of water on it, and when I quit operating there were eighteen feet on it in most places. Where the water was shallow we invariably went at the mud stern foremost. The stern was always loaded down to eighteen feet when dredging, but the bows were not loaded down. In dredging, the stern was always several feet lower down than the bows, say three or four feet."

The boat built by the defendants, which was called the "Essayons," was operated in precisely the same way. Being built expressly for dredging, her dredging screw was placed at her stem, it is true; but her mode of operation was the same as that of the "Enoch Train." Her master, Putnam, describes it as follows: —

"The method we use is to go outside the bar into deep water; then we sink the dredging end of the vessel, by filling up the tanks at that end with water to any depth required. Then we start the propelling screw at the other end of the vessel, and go in with that until the vessel grounds; then we stop the propelling screw and start the dredging screw, and as that screw revolves it cuts up the mud at the bottom and drags the vessel after it at the same time; after going as far as we wish we stop the dredging screw, lower the rake at the dredging end, and back out into deep water, using either or both of the screws to go back with, thus dragging the mud after us that the dredging screw has cut up from the bottom, and carrying it out into deep water; or rather, the operation is, that the dredging screw agitates the mud and throws it up into the surface current, and the current takes it out to a large extent, while the rake takes fresh hold of the bottom and also carries out whatever is broken up by the screw and settles from the current. After backing out into deep water, we hoist the rake and go back again and repeat the operation. When we first arrived at the bar we made several experiments as to the best mode of dredging, but the mode above described we found to be the correct one, and have ever since used."

Nearly all the witnesses examined on the subject declare that there is no difference in principle between the mode of operation of the "Enoch Train" and that of the "Essayons." The scraping or raking apparatus is not mentioned in the plaintiff's patent at all. This, as will be hereafter seen, is part of the original design of General McAlester, the government officer who had charge of the improvement of the mouth of the Mississippi.

It is further noticeable that the "Essayons," as is abundantly established by the evidence, always worked with her stem

sunk and depressed, and never with an even keel, upon which special emphasis is placed by the patent in suit.

It may well be asked, at this point, Where was there any invention in the device described in the patent? Was it invention to place a screw for dredging at the stem of the boat? Nothing more than this was in reality suggested by the patentee. And that was substantially what was done with the French steamers prior to 1859, and with the "Enoch Train" in that year. They were turned end for end, and the stern was used as the stem, and the screws went forward, working in the bottom deposit in advance of the vessels. When the "Enoch Train" was procured for the service which she performed, she was ready made, and the contractors, to save time and expense, simply supplied her with a tank, in order to settle her to the proper depth, and they found her very serviceable. Had she been built for a dredge-boat, with the design of using screws for dredging (as she did use them), can it be doubted that her dredging screw would have been placed forward instead of turning her stern forward? Would not this have been suggested by ordinary mechanical skill? The plan and mode of operation would have been precisely the same. When, after this, the government proceeded to build a boat expressly for dredging the mouths of the Mississippi, we should naturally expect to find it built as the "Essayons" was built, with her dredging screws at the stem instead of the stern. The making of them with longer blades than those of the propelling screw, and sharpened at the points, would be a matter of course. No invention would be requisite for any of these arrangements. It seems to us that the whole principle of the "Essayons's" construction and furnishment, as well as that of the patent in question, was anticipated by the "Enoch Train," if not by the French steamers, and that a patent for that principle, though qualified by the natural incidents and adjuncts of its application, ought not to be sustained.

The process of development in manufactures creates a constant demand for new appliances, which the skill of ordinary head-workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development. Each step forward prepares the way for

the next, and each is usually taken by spontaneous trials and attempts in a hundred different places. To grant to a single party a monopoly of every slight advance made, except where the exercise of invention, somewhat above ordinary mechanical or engineering skill, is distinctly shown, is unjust in principle and injurious in its consequences.

The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith.

But the "Enoch Train" did not exhibit all that was done in the matter of dredge-boats anterior to the alleged invention of Brady. If the application of dredging screws to the stem of a boat, driven by a propellor or otherwise, was not formally exhibited in the "Enoch Train," it was certainly exhibited in the invention of one Ephraim B. Bishop, which was patented in April, 1858, and was applied by Brady himself to a dredge-boat called the "Wiggins Ferry," fitted up and operated by him at the mouth of the Mississippi in 1866. This boat was propelled by an ordinary centre paddle-wheel, and to the bow was fixed two revolving conical-shaped screws, which, on being let down to the river-bottom, cut and stirred up the mud and sand, and caused it to float away in the current. Each screw was driven by a separate steam-engine. Bishop was examined as a witness, and testified that the idea occurred to him from

seeing a stern-wheel boat on the Arkansas River make a channel for herself by turning stern foremost and removing the sediment by the revolution of her propeller. He says: —

"About 1852 or 1853, I was then keeping store at Van Buren, Arkansas. The difficulty of getting goods up the Arkansas River, in consequence of sand-bars, was very great, — so great that we had a cargo of goods, nearly a whole boat-load, that was detained in consequence of sand-bars for at least eight months before she could reach Van Buren from Pine Bluff, Arkansas. Seeing this necessity of removing these obstructions, and knowing all about the usual machines up to that date that had been invented, and their capacity, and knowing of the very great amount of sediment that must be removed to do any good, it appeared to me absolutely necessary that machinery of greater capacity and strength should be invented, and, thinking upon this subject, I thought of and planned out one or more spirally-flanged screws, to be rotated by machinery on deck of a boat or in her hull, with the large ends of the spiral screws down, with sharp cutting corners or points, the screws to revolve right and left powerfully, intended to elevate the sediment up the inclination of the drum by reason of the powerful motion of those drums; the water being comparatively still, would necessarily force the sediment up the inclination of the screws, and throw the sediment off to the right and left into the water, which would carry it to harmless localities. This was the first plan that was afterwards developed into my patent."

In the fall of 1866 Brady and several other persons associated with him, Bishop himself being interested, made a contract with the government to dredge the Southwest Pass of the Mississippi, and procured for the purpose the "Wiggins Ferry," and fitted up her bow with Bishop's apparatus. Brady had the superintendence of her fitting up, and of operating her after she was ready for work. They commenced upon her in November, 1866, but did not get her started until the 19th of March, 1867. After working with her for several months, and finding that she was not strong enough for the work required in the Southwest Pass, and that the sediment would fill up again when she was taken off for repairs (although they

often succeeded in deepening the channel three or four feet), the contract was abandoned. For a common river-bottom she would have answered well enough. Mr. Roy, one of the parties interested in her, and who was on her for several days at the commencement of her operations, says that in the pass, before trying the bar, she worked very successfully. If her machinery was not strong enough for accomplishing the hard work to be done on the bar, she was nevertheless well fitted for lighter dredging, and exemplified in her construction the use of screws at her stem.

It is true that Bishop's patent was not set up by way of defence in the answer; but there is no dispute as to the time it was issued, and that fact, together with Bishop's testimony, makes it clear that his invention, which was exemplified in the "Wiggins Ferry," was made as far back as 1858, anticipating Brady according to his own showing for at least seven or eight years.

It is clear, then, that Brady did not invent the furnishing of vessels with water-tanks, so arranged as to sink them on an even keel; for these had been used long before in the light-draft monitors: he did not invent the use of revolving screws on a dredging-boat, for cutting and stirring up the mud and sediment; for these had been used for that purpose on the French steamers, and on the "Enoch Train," in and prior to 1859: he did not invent the use of water-tanks in a dredging-boat for sinking the screws down to the bottom or bar to be dredged; for this plan had been adopted in the "Enoch Train:" he did not invent the application of screws to the forward end of a dredge-boat, so as to work in advance of the boat; for this had been virtually done on the "Enoch Train," and was formally done on the "Wiggins Ferry," the plan of which had been invented by Bishop in 1858. What, then, did he invent? Did he make a selection and combination of these elements that would not have occurred to any ordinary skilled engineer called upon, with all this previous knowledge and experience before him, to devise the construction of a strong dredge-boat for use at the mouth of the Mississippi? We think not. We think that there is no reasonable ground for any such pretension.

But if a different conclusion could be reached, to our minds it is as certain as any fact depending on conflicting testimony can be, that Brady derived the ideas embraced in his patent from General McAlester, the government officer who in 1866 and 1867 had charge of the improvements at the mouth of the Mississippi River, and that he never conceived these ideas till they were communicated and explained to him by General McAlester during the fitting up of the "Wiggins Ferry" at New Orleans and during the progress of her operations at the Southwest Pass. It is proved by overwhelming evidence that during the whole period of her fitting up, and until it was developed by her working on the bar that she was incapable of performing the work required of her at that place, that Brady regarded and spoke of Bishop's plan as the best possible plan that could be devised, and that although deeply interested in the success of the operations, he never alluded to or hinted at any plan of his own devising different from it. His whole conduct for months, as well as his total silence on the subject of any prior invention made by himself, in all his intercourse with his associates in the contract, with the government officers in charge, and with the superintendents and owners of the foundry where the "Wiggins Ferry" was fitted up, is the strongest possible proof that no such invention as he claims had been projected by him. The witnesses who speak of his conversations and sketches in December, 1865, and early in 1866, as communicated to them with the utmost freedom, with no apparent object so far as they were concerned, must either be mistaken as to the time, or as to the devices described. Interested as he is in the result of the suit, his own testimony cannot be allowed to prevail against a course of conduct so utterly at variance with it. It may be true; but we cannot give it effect against what he himself did, and did not do, without disregarding the ordinary laws that govern human conduct.

During the operations of the "Wiggins Ferry" on the bar, it is true, he did make divers plans and drawings for an improved dredge-boat. The first, made as Lieutenant Payne says, a week or ten days after the vessel arrived at the Southwest Pass (therefore the last of March or first of April), was merely a modification of Bishop's plan, placing the cones

parallel to each other instead of being pointed together in a salient angle, and providing the boat with water-tight compartments by which she could be raised or lowered. He worked at these drawings for some time, and Lieutenant Payne helped him to make tracings of them. In one corner of the drawings on the same sheet two or three screws were exhibited, intended to be used in place of the cones if thought best or desired. It is stated in the bill that on the 17th of May, 1867, Brady filed a caveat in the Patent Office, describing his invention; but the patent was not obtained till the 17th of December following. No copy of the caveat appears in the record, so that we cannot tell what it contained.

Now, where was it that Brady, who had been so enthusiastic upon the superlative merits of Bishop's plan as applied to the "Wiggins Ferry," obtained the new light which resulted in the filing of his caveat the 17th of May, and in the obtaining of his patent in December? The story is told by Lieutenant Payne, who appears to be, not only an intelligent, but an entirely disinterested, witness. He says:—

"In the latter part of February, 1867, at the engineer office, New Orleans, Gen. McAlester told Brady that he had doubts of the successful working of the 'Wiggins,' and in the case of her proving a failure he should suggest to the engineer department a plan of his own for doing that work, which plan he then explained to Brady in my presence. He said he should recommend the building of a strong vessel provided with propellers at each end, and arranged with water-tight compartments, so that the vessel could be raised or lowered at pleasure. She was also to be provided with scrapers, which could be attached at either end, and raised or lowered at will by machinery. She was to have rudders at each end, and be able to move in either direction, either head or stern, equally well. He proposed to try the scrapers first, and if they were not found to work satisfactorily, to try any other device which might be thought practicable. Brady seemed to be much pleased with the idea, but seemed confident of the success of the 'Wiggins.'"

It further appears that General McAlester, in pursuance of his idea, communicated his plans to the government board of engineers, and during the spring and summer of 1867, com-

mencing as early as April, prepared the plans and specifications according to which the "Essayons" was afterwards built. It is very strange that the copy of General McAlester's letters to the department, and several other important exhibits that were put in evidence, have not been inserted in the record used on this appeal. Where the fault lies, it is not for us to say. Sufficient appears, however, notwithstanding the evidence adduced to the contrary, consisting mostly of the testimony of the complainant himself, to convince us that Brady derived his whole idea from the suggestions of General McAlester; and that the plans for the construction of the "Essayons" originated entirely with that officer.

Our conclusion is, that the patent sued on cannot be sustained, and that the decree of the Circuit Court must be reversed, and the cause remanded with instructions to dismiss the bill of complaint.

Decree reversed accordingly.

NEW YORK GUARANTY COMPANY *v.* MEMPHIS WATER COMPANY.

1. An assignee of a chose in action, or any other *cestui que trust*, cannot, merely on the ground that his interest is an equitable one, proceed in a court of equity to recover his demand. *Hayward* v. *Andrews*, 106 U. S. 672, cited upon this point and approved.
2. The courts of the United States especially, in view of the act of Congress declaring that suits in equity shall not be sustained where there is a plain, adequate, and complete remedy at law, should enforce this rule.
3. Certain parties holding bonds secured by a mortgage filed their bill to recover moneys alleged to be due on a contract which the city of Memphis made with the mortgagor, and which was assigned in the mortgage as part of the security for the bonds. *Held*, that the bill will not lie, the demand against the city being cognizable at law in the name of the mortgagor, and no special circumstances shown for a resort to equity.

APPEAL from the Circuit Court of the United States for the Western District of Tennessee.

The case is stated in the opinion of the court.

Mr. William M. Randolph for the appellants.

Mr. Joseph B. Heiskell for the appellees.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case was commenced by a bill in equity filed by the New York Guaranty and Indemnity Company and others, holders of bonds of the Memphis Water Company, against said Water Company, the city of Memphis, the trustees of a mortgage given to secure said bonds, and certain others of the bondholders and persons interested. The principal object of the bill was to have declared valid a certain contract made between the city and the Water Company, and to compel the city to comply with its terms, in order that the moneys alleged to be due thereon from the city might be applied to the payment of the bonds held by the complainants and others, the said contract being included in the mortgage. There was also a prayer for a sale of all the property and privileges of the Water Company under the mortgage, and an alternative prayer that the said contract might be cancelled if the court should hold it to be void, and that then the city might be compelled to pay up a subscription it had made to the stock of the Water Company, or else that the stock might be cancelled. The circumstances of the case on which the bill was founded may be briefly stated as follows: —

The charter of the city of Memphis, amongst other things, conferred upon its corporate authorities the power of supplying the city with water for all purposes. But on the 28th of February, 1870, an act was passed chartering the Memphis Water Company, and giving to it the exclusive privilege of laying down water-pipes and extending aqueducts and conductors through all or any of the streets, lanes, and alleys of the city, and of supplying to the inhabitants water by public works. Under this charter the company commenced operations for laying pipes and erecting works without the acquiescence of the city authorities. The city undertook to carry out a counter scheme, which had been under consideration for several years. A litigation ensued, which resulted in June, 1871, in a judgment of the Supreme Court of Tennessee, confirming the Water Company's exclusive right, and enjoining the city from interfering therewith, the court holding in substance that the exclusive right given to the Water Company suspended that of the city for the period named in the former's charter. There-

upon, on the 18th of January, 1872, the city and the Water Company entered into a contract whereby, amongst other things, the Water Company agreed to erect water-works in the city, including a certain number of street hydrants, of a peculiar construction, which the city agreed to hire for the purpose of extinguishing fires, and to pay therefor a certain annual rent; and it was mutually agreed that the city should receive one-half of the company's capital stock, amounting to $100,000.

Immediately after this contract was executed the Water Company took measures to raise money by an issue of bonds to the amount of $600,000. For this purpose they executed a deed of trust in the nature of a mortgage to F. S. Davis, T. R. Farnsworth of Memphis, and J. L. Worth of New York, whereby they conveyed all their franchises, lands, wells, pumps, machinery, pipes, and other property then held and thereafter to be acquired, and all the income which they might thereafter "receive, acquire, or become entitled to, including all sums of money which the party of the first part may become entitled to receive from the city of Memphis under and by virtue of a contract made and entered into between the said city of Memphis and the said party of the first part hereto on the eighteenth day of January, A. D. 1872." This deed was declared to be given for the purpose of securing the payment of six hundred bonds of $1,000 each, payable to bearer, with interest at seven per cent per annum semi-annually. In case default should be made in payment of principal or interest, power was given to the trustees to take possession of the property and books of the company, and to collect all moneys due to it, including all sums due or coming due from the city of Memphis under the said contract, and to apply the same to the payment of unpaid interest on the bonds; and, if two successive instalments of interest should be unpaid, the principal to become due, and at the request of a majority in interest of the bondholders, the trustees should take possession, give notice, and sell the entire property for cash, and apply the same to the payment of principal and interest on the bonds.

The bonds provided for by this mortgage were duly issued and disposed of, and the complainants represent themselves as

holding nearly all of them; those supposed to hold the remainder being made defendants.

It is alleged, and not denied, that on or prior to the 1st of April, 1873, the water-works were completed and in operation, and the hydrants stipulated for in the contract of January, 1872, were used by the city. But the city refusing to pay the rent therefor, a suit was brought by the Water Company against the city to recover the first instalment of rent due. After the pleadings were filed, the writ and declaration were amended by consent so as to be in the name of the Water Company, to the use of Davis, Farnsworth, and Worth, trustees of the mortgage. The cause was tried in April, 1874, and a verdict was given and judgment rendered for the plaintiffs. The Supreme Court of Tennessee, on writ of error, reversed this judgment in December, 1876, and awarded a new trial, the court holding that the contract between the city and the Water Company was *ultra vires* of the city and absolutely void.

In the mean time, in May, 1875, whilst the writ of error was pending, at the request of the requisite number of bondholders, the trustees of the mortgage took possession of the property of the Water Company, and proceeded to advertise the same for sale. Thereupon one T. W. Yardley, a holder of some of the bonds, filed a bill in equity in the Chancery Court of Shelby County, Tennessee, alleging that the New York Guaranty and Indemnity Company had obtained the bonds held by it for an usurious and corrupt consideration, which made it inequitable for that company to hold the said bonds, or at least for the full amount thereof; and that said company was urging the trustees to make said sale, which would at that time be at a sacrifice of the property; and he prayed for an injunction to prevent the sale, and for an investigation of the true amount due, if anything, to said New York Guaranty and Indemnity Company. All — the bondholders as well as the Water Company itself — were made parties to the suit. A temporary injunction was granted. On the 25th of May, 1875, a decree was made by consent of all parties, that the property should be exposed for sale by the trustees on sixty days' notice, whenever the court in its discretion should so order, on the demand of the requisite number of bondholders, and that the mutual rights of the par-

ties to a distribution of the proceeds should be ascertained by the further litigation in the cause; the trustees in the mean time to keep possession of the property and account for all receipts and expenditures. An amendment to the bill was afterwards filed, which prayed an account to be taken of the amount justly due to all parties, and for a foreclosure and sale of the mortgaged premises. Answers and cross-bills were filed, nearly all the bondholders appearing to assert their respective interests. In January, 1876, the cause was removed to the Circuit Court of the United States, and further proceedings took place in that court. On the 15th of May, 1876, the trustees, at their own request, and with the assent of all parties, were by decree discharged from the custody of the water-works, and the president and secretary of the Water Company were placed in charge; but it was stated in the decree that the property was not thereby restored to the company itself, but to be operated in the interest of the bondholders, and at all times subject to the supervision and control of the court. In March, 1877, a few days after the filing of the bill in the present case, a decree was made dismissing Yardley's bill and the several cross-bills. An appeal was taken to this court, but was dismissed for want of prosecution. On the 2d of June, 1879 (after the final decree was made in the present case), the Circuit Court, on the application of the New York Guaranty and Indemnity Company and others, holding a majority of the bonds, made a decree in the Yardley suit, in pursuance of the consent decrees of May 28, 1875, and May 15, 1876, ordering a sale, by a commissioner appointed for that purpose, of all the franchises, rights, privileges, and property conveyed by the deed of mortgage, and authorizing the commissioner to receive the bonds and coupons secured by the mortgage, as cash in payment of the property, and foreclosing the equity of redemption. In answer to an application of the appellants here, it is now shown by the appellees that the said decree for sale was carried into effect in 1880, and the purchase-money paid, and that in June of that year, pending this appeal, the Circuit Court made a decree confirming said sale.

In the present case, the principal defence set up by the city of Memphis, by answer and demurrer, was the alleged ille-

gality of the contract, as adjudged by the Supreme Court of Tennessee. It was also insisted that there was a complete and adequate remedy at law; that if there was any cause of action or complaint, it was vested in the Water Company and the trustees of the mortgage, all of whom reside in Tennessee; and that the complainants, if they have any claim, acquired it through the assignment of the Water Company, which, itself, could not maintain a suit in the United States court. The Circuit Court concurred in the view taken by the Supreme Court of the State, and held that the contract on the part of the city was *ultra vires* and void, and dismissed the bill by a final decree rendered May 27, 1879. From this decree the present appeal was taken.

The main object of the bill was to enforce the performance of the contract made between the city of Memphis and the Water Company; to have it declared binding, and to compel the city to pay the rents due under it, in order that they might be applied in satisfaction of the bonds held by the complainants and others. There was added, it is true, a prayer for the foreclosure and sale of the mortgaged property, and the application of the proceeds to the payment of the debts received. But this latter relief was already provided for by the consent decrees entered in the Yardley suit, which, as we are now informed, have been carried into effect at the instance of the appellants themselves pending this appeal. The important question to be considered is, whether the principal relief prayed for can be granted in this suit.

The contract sought to be enforced was not made with the complainants; nor has it ever been assigned to them. It was made with the Water Company, and its interest therein was assigned to the trustees of the mortgage, as part of the security for the payment of the bonds held by the complainants. Whatever interest the complainants have therein they derive as beneficiaries under the mortgage through the assignment which it contained. They stand in no better plight for the maintenance of the suit than the trustees would if they had brought it. There seems to be no reason, indeed, why the suit was not brought by the trustees. No allegation is made that they were even unwilling to bring it. The legal interest of the mortgage

was in them, and they were the proper representatives of all the bondholders, and the most proper persons to protect the trust in their hands. Indeed they did bring a suit to enforce the contract. The action at law brought in the name of the Water Company against the city for the recovery of the first instalment of rent was prosecuted for the use of the trustees; and this was really the proper mode of proceeding. Had the judgment in that case been a final one, the questions raised in this cause would have been *res judicata;* but a new trial being ordered it failed to have this effect. Thereupon, shortly after the decision of the Supreme Court was rendered, the principal bondholders, without, so far as appears, making any effort to have that suit further prosecuted, brought this suit in the Federal Court in their own names as complainants, and seek in this indirect way to accomplish the same purpose which was attempted to be obtained by the direct proceeding in the State court. It is a manifest attempt to evade the decision of the case by that court, which had full and adequate jurisdiction of the subject.

It was objected *in limine*, by the demurrer to the bill, that as the complainants claim under the assignment of the contract made to the trustees, the Circuit Court had no jurisdiction, because the Water Company, with which the contract was made, and which made the assignment, is a citizen of Tennessee. This objection is insisted on here, and would seem to be conclusive, if the citizenship of the parties were the only ground of jurisdiction of the Circuit Court. The act of March 3, 1875, c. 137, declares that no Circuit or District Court shall have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made. This suit is founded on the contract between the city and the Water Company; the whole claim of the bondholders to any benefit therefrom depends upon the assignment thereof contained in the mortgage deed; and although the trustees of the mortgage are the real assignees, the bondholders, as *cestuis que trust*, claim under them and stand on no higher plane, as regards the right to sue, than the trustees themselves. The complainants, however, insist that this suit is cognizable by the

Circuit Court by reason of that court's having judicial possession and control of the mortgaged property in the Yardley suit. The bill and cross-bills in that suit, it has been seen, were dismissed; but the parties regarded the consent decrees entered therein as giving the court authority to keep the property under its control, and to cause it to be sold. Therefore, so far as relates to the water-works themselves, and all the property comprised in the mortgage which is susceptible of actual possession, the position of the appellants may be correct. But the claim against the city does not lie in possession, but in contract alone. The contract itself may be subject to sale as part of the mortgage assets; but the proceeds of the contract, the money alleged to be due from the city to the Water Company under it, has never been reduced to possession, and the city of Memphis denies its liability to pay it. In order to reduce to possession the money claimed to be due, and subject it to the control of the court, the ordinary mode of enforcing the contract must be resorted to. It may be that the Circuit Court had the power to direct such a proceeding to be had as ancillary to its administration of the mortgage fund; but it must be a proper proceeding, adapted to the nature of the demand. If a promissory note were included in the mortgage fund, and the parties liable upon it should refuse to pay it, the Circuit Court might probably order the trustees of the mortgage to bring an action on the note; but a bill in equity would hardly be considered a proper proceeding for enforcing its collection. The view we have taken with regard to the propriety of the proceeding in this case, for enforcing the contract against the city, renders it unnecessary to determine the question raised on the assignment of it by a citizen of Tennessee. Whether the contract is, or is not, a valid one, and if valid, what are the obligations of the city under it, and the damages for the breach thereof, are pure questions of law, which the city cannot, under ordinary circumstances, be compelled to litigate with any other party than the Water Company or its legal assigns. If the parties having the legal interest refuse to sue, those having the beneficial interest will be authorized to use their names on giving them proper indemnity against costs. The city has a right to be confronted with those who

have the legal interest in the contract, unless they absolutely refuse the use of their names, or special circumstances exist which would prevent or greatly embarrass the prosecution of the suit. It does not lose its right to a trial at law by any pledges or assignments which the Water Company may make of its interest in the contract. Such pledges or assignments may create equitable rights in regard to that interest, as between the Water Company and the assignees; but the contract, so far as the city is concerned, remains a matter of legal cognizance. If a merchant should pledge his bills receivable as security for a loan, any equitable rights which arise between him and his pledgee may be adjudged in equity; but the makers and acceptors of the bills must be sued thereon at law. And so here: whilst the equities between the Water Company as mortgagor and the mortgagees, or those claiming under them (such as the right of redemption, &c.), may be determined by a court of equity, the legal demand against the city on the contract is cognizable at law, and should be prosecuted in the ordinary courts of law, as was done in the action brought in the name of the Water Company against the city. Every question arising on the contract in this suit is determinable in an action at law, and was determined in the action referred to.

Recurring for a moment to the leading facts: how does the case really stand? The trustees of the mortgage, on default of the Water Company in payment of interest, took possession of its works, and carried them on. In performing this duty they found, or supposed they had found, that certain rents had accrued and were accruing from the city for the use of the hydrants, under the contract in question, which rents the city refused to pay. To establish the contract and recover these rents, their remedy was clear and adequate by an action at law in the name of the Water Company. They brought such an action, and failed by the adverse decision of the Supreme Court of Tennessee. Then the bondholders, dissatisfied with this result, brought this suit in equity in the Federal court for the purpose of raising the same questions anew. It is difficult to see how they acquired any right to transfer the controversy from a court of law to a court of equity. The fact that

they have only a beneficial interest is not of itself sufficient. Whether the legal interest in the contract remained in the Water Company or became vested in the trustees, an action at law could have been brought in the name of the party having it. There is no allegation in the bill that either of these parties were applied to, or that they refused to allow such an action to be brought in their names.

We have lately decided, after full consideration of the authorities, that an assignee of a chose in action on which a complete and adequate remedy exists at law cannot, merely because his interest is an equitable one, bring a suit in equity for the recovery of the demand. *Hayward* v. *Andrews*, 106 U. S. 672. He must bring an action at law in the name of the assignor to his own use. This is true of all legal demands standing in the name of a trustee, and held for the benefit of *cestuis que trust.* Besides the authorities cited in that case, reference may be made to Mitford on Pleading, 123, 125; Willis's Equity Plead. 435, note (*g*); *Adair* v. *Winchester*, 7 Gill & Johns. (Md.) 114; *Moseley* v. *Boush*, 4 Rand. (Va.) 392; *Doggett* v. *Hart*, 5 Fla. 215; *Smiley* v. *Bell*, Mart. & Y. (Tenn.) 378; and the English and American notes to *Ryall* v. *Rowles*, 1 Ves. Sen. 348, and to 2 White & Tudor's Leading Cases in Equity, pp. 1567, 1670 (ed. 1877).

In view of the early enactment by Congress in the sixteenth section of the Judiciary Act (Rev. Stat., sect. 723), declaring "that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law," the rule laid down in *Hayward* v. *Andrews* is entitled to special consideration from the courts of the United States. This enactment certainly means something; and if only declaratory of what was always the law, it must, at least, have been intended to emphasize the rule, and to impress it upon the attention of the courts.

We think that the present case clearly falls within the rule. The bill alleges no special circumstances which can properly take it out of its operation. The fact that there are many beneficiaries entitled to a distribution of the fund is not sufficient for that purpose. All the property covered by the mort-

gage deed constitutes one fund, and is to be brought together and administered as such by first discharging the expenses of the trust, and distributing the residue amongst the bondholders *pro rata*. There is no such division and separation of interests into distinct parcels as existed in the case of *Field* v. *Mayor, &c. of New York*, reported in 6 N. Y. 179. The whole beneficiary interest is a unit, and is represented by the trustees of the mortgage; and the case presents no difficulty or embarrassment in the way of an action at law.

We think, therefore, that the bill could have been properly dismissed on this ground alone; and this renders it unnecessary for us to consider the other questions in the case.

Decree affirmed.

COTZHAUSEN v. NAZRO.

1. Dutiable goods cannot lawfully be imported in the foreign mail under the International Postal Treaty of Berne of Oct. 9, 1874. 19 Stat. 577.
2. Such goods are, in the hands of the receiver of them from the post-office, subject to seizure; and the fact that there was no intent on the part of the sender or the receiver of them to defraud the United States of the duty, does not render the customs officer liable to an action for making the seizure.

ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

The case is stated in the opinion of the court.

Mr. F. W. Cotzhausen for the plaintiff in error.

Mr. Assistant Attorney-General Maury for the defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

This was a suit commenced before a justice of the peace by Cotzhausen against Nazro and Payne, for seizing and converting to their own use a flexible woollen scarf or shawl of the value of four dollars. It was removed into the Circuit Court of the United States by a writ of *certiorari*, on the ground that Nazro was collector of customs of the United

States for the port of Milwaukee, and that what was done in seizing the shawl was in performance of his duty as such collector.

On the trial in that court it appeared that the article in question came in a closed or sealed envelope by foreign mail from Germany, and the proper officer of the customs at Milwaukee being notified to be present when the letter was delivered to and opened by the plaintiff, seized it as forfeited under the customs laws of the United States.

The jury being requested to make a special verdict, answered the questions propounded to them by the court as follows: —

"*Question 1st.* Was the article in question sent from a foreign country by mail, enclosed in a sealed envelope addressed to the plaintiff at Milwaukee, and was it transmitted by mail, thus enclosed, to its point of destination?

"*Answer.* Yes.

"*Quest. 2d.* Were the contents of the package disclosed by any writing placed upon it by the sender?

"*Ans.* Yes.

"*Quest. 3d.* Was the package received at the post-office in Milwaukee, and, if so, was the collector of customs for this district notified of its receipt?

"*Ans.* Yes.

"*Quest. 4th.* Was the package placed in the hands of the plaintiff by a clerk in the post-office, in the presence of the deputy collector, and did she open it?

"*Ans.* Yes.

"*Quest. 5th.* Did the deputy collector of customs then seize the article in question, after it was opened?

"*Ans.* Yes.

"*Quest. 6th.* Did the collector thereafter cause said article to be appraised by the appraiser for this collection district, and did he refuse to surrender it to the plaintiff without payment of the amount of such appraisal?

"*Ans.* Yes.

"*Quest. 7th.* Was the article sent by mail for the purpose or with intent on the part of the sender or the plaintiff to avoid the payment of duties thereon?

"*Ans.* No.

"*Quest.* 8*th*. What was the value of said article on the twenty-first day of May, 1877?

"*Ans.* $4.00."

And on this verdict the Circuit Court rendered a judgment for the defendants with costs.

A bill of exceptions is signed embodying all the evidence in the case, from which it appears that there was no little ill-feeling in the case on the part of the plaintiff and her attorneys, who refused to make application to the Secretary of the Treasury for a remission of the penalty, and that the seizure was reported to him and to the proper law officers by the collector. But as no ruling of the court was made on the admission or rejection of this evidence, and as no instructions of the court were given or asked, and no exception was taken to any ruling of the court at the trial, the bill of exceptions is of no value here.

The plea to the action was the general issue, and we must look alone to the special verdict to see if it justified the judgment of the court.

The letter containing this scarf came from Germany to the United States under the international postal system, established by the treaty of Berne, of Oct. 9, 1874. The twenty-fifth article of the protocol to that treaty, which, under the signatures of the plenipotentiaries who negotiated it, is declared to be of the same force as if it was inserted in the treaty, provides that "there shall not be admitted for conveyance by the post any letter or *other packet* which may contain either gold or silver money, jewels, precious articles, or any article whatever liable to customs duties." 19 Stat. 604, art. 25.

While some attempt in argument is made to show that, either by treaty or by act of Congress, books, patterns of merchandise, and perhaps other articles may come through the foreign mail without liability to forfeiture, it is sufficient to say that the article seized in this case was not sent as a sample, nor is it a book or other article asserted to be admissible.

Its introduction into the United States in this manner is, therefore, forbidden by the express provisions of the postal treaty under which it came, which is the law of the land, and is unauthorized by any act of Congress.

No question is made in this case that the shawl was dutiable, or that the amount of the duty claimed on it was the proper duty.

Being dutiable, its introduction by mail into the United States was forbidden by the treaty. The revenue laws of the United States require that every owner or consignee of property imported from other countries shall report the same to the customs officers before it is landed from the vessel, and shall furnish an invoice of its character and purchase price, for valuation, or that it may be seen if it is duty free, and all the vexatious and annoying machinery of the custom-house, and the vigilance of its officers, are imposed by law to prevent the smallest evasion of this principle.

Of what avail would it be that every passenger, citizen and foreigner, without distinction of country or sex, is compelled to sign a declaration before landing, either that his trunks and satchels in hand contain nothing liable to duty, or if they do, to state what it is, and even the person may be subjected to a rigid examination, if the mail is to be left unwatched, and all its sealed contents, even after delivery to the person to whom addressed, are to be exempt from seizure, though laces, jewels, and other dutiable matter of great value may thus be introduced from foreign countries.

It is a violation of the law to introduce dutiable articles at all in that mode, and articles so introduced are liable to seizure for such violation.

But the jury found that the shawl was not sent by mail for the purpose or with the intent, on the part of the sender or the plaintiff, to avoid the payment of duties thereon; and it is said that, under sect. 3082 of the Revised Statutes, the goods cannot be seized or forfeited unless fraudulently or knowingly imported contrary to law.

Rev. Stat., sect. 3082, provides: "If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited, and the offender

shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both."

The language of this section is that if a person fraudulently *or knowingly* brings into the United States, or assists in so doing, any merchandise contrary to law, the goods shall be forfeited and the offender punished by fine and imprisonment; and while the jury negative the fraudulent intent, they do not negative the knowledge of the sender that the goods were sent in violation of law, or that they were dutiable goods.

This fraudulent and guilty knowledge, however, relates mainly to the punishment of the offender by fine and imprisonment, and other sections, as 3061, authorize and direct the seizure of any property imported contrary to law; and the officer is to open envelopes for that purpose, and, on reasonable ground to believe it subject to duty or to have been unlawfully imported, he shall seize and secure the same for trial.

In this case the article was unlawfully imported in a sealed envelope, and it was discovered and seized by the proper officer in the hands of the owner after she had opened it.

There is no finding by the jury as to what he did with it, except that he had it appraised. But the presumption is that he did his duty, by notifying the officers whose business it was to institute proceedings for condemnation; and though we may not properly look at the bill of exceptions, which shows what he did with it, this is unnecessary, for if the seizure was rightful, there is no evidence whatever of a wrongful conversion.

It has been suggested that by reason of sect. 16 of the act of June 22, 1874, c. 391, and the finding of the jury that there was no intention to defraud in this case, the defendants are liable. But that section relates to actions brought by the government to enforce the revenue laws by fine, forfeiture, and penalty, and declares that in such cases, unless there is a verdict of the jury or finding of the court that the alleged acts were done with an actual intention to defraud the United States, no fine, penalty, or forfeiture shall be imposed.

If the plaintiff in this case shall, in any proceeding in court for its condemnation, appear and claim this property, or any

suit shall be instituted against her personally for a violation of the revenue law, she can have the full benefit of this statute; or, if she is impatient of the delay of the officers in instituting such proceeding, she can, under sect. 3076 of the Revised Statutes, cause such proceeding to be instituted, in which she can have the same relief.

But if the present action be sustained on the ground of the absence of fraudulent intention on her part, the officer making the seizure is held liable in the absence of such a proceeding, though in such case the court might have protected him by a certificate of probable cause, and though he may have done his duty and been guilty of no conversion. Such a construction of the statute requires him to know the guilty or the innocent intent of a party violating the law at the hazard of personal liability for the result.

It is to be observed, also, that all the trouble, cost, and vexation of this suit could have been avoided by an application to the Secretary of the Treasury under sect. 5293 and the rules prescribed by that officer for such cases, when he would undoubtedly have remitted the forfeiture on what were the undisputed facts of the case, on payment of the small sum assessed as the duty.

We think that in making the seizure the defendants only did their duty, and that whatever the hardship was to the plaintiff, they are not liable in this action on the facts found in the verdict of the jury.

Judgment affirmed.

MR. JUSTICE FIELD did not sit in this case, nor take any part in deciding it.

KRING v. MISSOURI.

1. A. was convicted of murder in the first degree, and the judgment of condemnation was affirmed by the Supreme Court of Missouri. A previous sentence pronounced on his plea of guilty of murder in the second degree, and subjecting him to an imprisonment for twenty-five years, had, on his appeal, been reversed and set aside. By the law of Missouri in force when the homicide was committed this sentence was an acquittal of the crime of murder in the first degree; but before his plea of guilty was entered the law was changed, so that by force of its provisions, if a judgment on that plea be lawfully set aside, it shall not be held to be an acquittal of the higher crime. *Held*, that as to this case the new law was an *ex post facto* law, within the meaning of sect. 10, art. 1, of the Constitution of the United States, and that he could not be again tried for murder in the first degree.
2. The history of the *ex post facto* clause of the Constitution reviewed in connection with its adoption as a part of the Constitution, and with its subsequent construction by the Federal and the State courts.
3. The distinction between retrospective laws, which relate to the remedy or the mode of procedure, and those which operate directly on the offence, is unsound where, in the latter case, they injuriously affect any substantial right to which the accused was entitled under the law as it existed when the alleged offence was committed.
4. Within the meaning of the Constitution, any law is *ex post facto* which is enacted after the offence was committed, and which, in relation to it or its consequences, alters the situation of the accused to his disadvantage.

ERROR to the Supreme Court of the State of Missouri.

The case is stated in the opinion of the court.

Mr. Jefferson Chandler and *Mr. L. D. Seward* for the plaintiff in error.

Mr. Samuel F. Phillips for the defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

Kring was indicted in the Criminal Court of St. Louis for murder in the first degree, charged to have been committed Jan. 4, 1875, and he pleaded not guilty. He has been tried four times before a jury, and sentenced once on a plea of guilty of murder in the second degree. His case has been three times before the Court of Appeals, and three times before the Supreme Court of the State. In the last instance, the Supreme Court affirmed the judgment by which he was found guilty

of murder in the first degree and sentenced to be hung. He thereupon brought the present writ of error.

It is to be premised that the Court of Appeals is an intermediate appellate tribunal between the Criminal Court of St. Louis and the Supreme Court of the State, to which all appeals of this character are first taken.

At the trial, immediately preceding the last one in the court of original jurisdiction, the prisoner was permitted to plead guilty of murder in the second degree. The plea was accepted by the prosecuting attorney and the court, and he was thereupon sentenced to imprisonment in the penitentiary for twenty-five years. He took an appeal from the judgment on the ground that he had an understanding with the prosecuting attorney that if he would plead as he did, his sentence should not exceed ten years' imprisonment. The Supreme Court reversed the judgment, and remanded the case to the St. Louis Criminal Court for further proceeding, where, when the case was again called, he refused to withdraw his plea of guilty of murder in the second degree, and refused to renew his plea of not guilty, which had been withdrawn when he pleaded guilty of murder in the second degree. The court, then, against his remonstrance, made an order setting aside his plea of guilty of murder in the second degree and directing a general plea of not guilty to be entered. On this plea he was tried, found guilty, and sentenced to death, and the judgment, as we have already said, was affirmed by the Supreme Court of the State.

By refusing to plead not guilty as charged in the indictment, and to withdraw his plea of guilty of murder in the second degree, the defendant raised the point that the proceedings under that plea — namely, its acceptance by the prosecuting attorney and the court, and his conviction and sentence under it — were an acquittal of the charge of murder in the first degree, and that he could not be tried again for that offence. This point he insisted on in the Circuit Court, the Court of Appeals, and the Supreme Court.

Both these latter tribunals, in their opinions, which are a part of the record, conceded that such was the law of the State of Missouri at the time the homicide was committed. But they overruled the defence on the ground that by sect. 23, art.

2, of the Constitution of Missouri, which took effect Nov. 30, 1875, that law was abrogated, and for this reason he could be tried for murder in the first degree, notwithstanding his conviction and sentence for murder in the second degree.

As after the commission of the crime for which he was indicted this new constitution was adopted, and, as it is construed by the Court of Appeals and the Supreme Court, it changes the law as it then stood, to his disadvantage, the jurisdiction of this court is invoked on the ground that, as to this case, and as so construed, it is an *ex post facto* law, within the meaning of sect. 10, art. 1, of the Constitution of the United States.

That it may be clearly seen what the Supreme Court of Missouri decided on this subject and what consideration they gave it, we extract here all that is said in their opinion about it.

"There is nothing in the point," they say, "that after an accepted plea of guilty of murder of the second degree the defendant could not be put upon trial for murder of the first degree. We shall, on that proposition, accept what is said by the Court of Appeals in its opinion in this cause."

What that court said on this subject is as follows:—

"The theory of counsel for defendant that a plea of guilty of murder in the second degree, regularly entered and received, precludes the State from afterwards prosecuting the defendant for murder in the first degree, is inconsistent with the ruling of the Supreme Court in *State* v. *Kring* (71 Mo. 551), and in *State* v. *Stephens* (id. 535). The declarations of defendant that he would stand upon his plea already entered were all accompanied with a condition that the court should sentence him for a term not to exceed ten years, in accordance with an alleged agreement with the prosecuting attorney, which the court would not recognize. The prisoner did not stand upon his plea of guilty of murder in the second degree; he must, therefore, be taken to have withdrawn that plea, and, as he refused to plead, the court properly directed the plea of not guilty of murder in the first degree to be entered.

"Formerly it was held in Missouri (*State* v. *Ross*, 29 Mo. 32) that, when a conviction is had of murder in the second degree on an indictment charging murder in the first degree, if this be set aside, the defendant cannot again be tried for mur-

der in the first degree. A change introduced by sect. 23 of art. 2 of the Constitution of 1875 has abrogated this rule. On the oral argument something was said by counsel for the defendant to the effect that under the old rule defendant could not be put on his trial for murder in the first degree, and that he could not be affected by the change of the constitutional provision, the crime having been committed whilst the old constitution was in force. There is, however, nothing in this; this change is a change not in crimes, but in criminal procedure, and such changes are not *ex post facto*. *Gut* v. *State*, 9 Wall. 35; *Cummings* v. *Missouri*, 4 id. 326."

We have here a distinct admission that by the law of Missouri, as it stood at the time of the homicide, in consequence of this conviction of the defendant of the crime of murder in the second degree, though that conviction be set aside, he could not be again tried for murder in the first degree. And that, but for the change in the Constitution of the State, such would be the law applicable to his case. When the attention of the court is called to the proposition that if such effect is given to the change of the Constitution, it would, in this case, be liable to objection as an *ex post facto* law, the only answer is, that there is nothing in it, as the change is simply in a matter of procedure.

Whatever may be the essential nature of the change, it is one which, to the defendant, involves the difference between life and death, and the retroactive character of the change cannot be denied.

It is to be observed that the force of the argument for acquittal does not stand upon defendant's plea, nor upon its acceptance by the State's attorney, nor the consent of the court; but it stands upon the judgment and sentence of the court by which he is convicted of murder in the second degree, and sentence pronounced according to the law of that guilt, which was by operation of the same law an acquittal of the other and higher crime of murder charged in the same indictment.

It is sufficient for this case that the Supreme Court of Missouri, in the opinion we are examining, says it was so, and cites as authority for it the case of *State* v. *Ross*, 29 Mo. 32, in the same court; but counsel for plaintiff in error cites to the same

effect the cases of the *State* v. *Ball*, 27 Mo. 324; *State* v. *Smith*, 53 id. 139.

Blackstone says: "The plea of *autrefoits convict*, or a former conviction for the same identical crime, though no judgment was ever given, or, perhaps, will be (being suspended by benefit of clergy or other causes), is a good plea in bar to an indictment. And this depends upon the same principle as the former (that is, *autrefoits acquit*), that no man ought to be twice brought in danger of his life for one and the same crime. Hereupon it has been held that a conviction of manslaughter, on an appeal or indictment, is a bar even in another appeal, and much more in an indictment for murder; for the fact prosecuted is the same in both, though the offences differ in coloring and degree." Bla. Com. Book 4, 336. See *State* v. *Norvell*, 2 Yerg. (Tenn.) 24; *Campbell* v. *The State*, 9 id. 333, 337.

This law, in force at the date of the homicide for which Kring is now under sentence of death, was changed by the State of Missouri between that time and his trial so as to deprive him of its benefit, to which he would otherwise have been entitled, and we are called on to decide whether in this respect, and as applied by the court to this case, it is an *ex post facto* law within the meaning of the Constitution of the United States.

There is no question of the right of the State of Missouri, either by her fundamental law or by an ordinary act of legislation, to abolish this rule, and that it is a valid law as to all offences committed after its enactment. The question here is, Does it deprive the defendant of any right of defence which the law gave him when the act was committed so that as to that offence it is *ex post facto?*

This term necessarily implies a fact or act done, *after* which the law in question is passed. Whether it is *ex post facto* or not relates, in criminal cases, to which alone the phrase applies, to the time at which the offence charged was committed. If the law complained of was passed before the commission of the act with which the prisoner is charged, it cannot, as to that offence, be an *ex post facto* law. If passed after the commission of the offence, it is as to that *ex post facto*, though whether of the class forbidden by the Constitution may depend on other

matters. But so far as this depends on the *time* of its enactment, it has reference solely to the date at which the offence was committed to which the new law is sought to be applied. No other time or transaction but this has been in any adjudged case held to govern its *ex post facto* character.

In the case before us an argument is made founded on a change in this rule. It is said the new law in Missouri is not *ex post facto*, because it was in force when the plea and judgment were entered of guilty of murder in the second degree; thus making its character as an *ex post facto* law to depend, not upon the date of its passage as regards the commission of the offence, but as regards the time of pleading guilty. That, as the new law was in force when the conviction on that plea was had, its effect as to future trials in that case must be governed by that law. But this is begging the whole question; for if it was as to the offence charged an *ex post facto* law, within the true meaning of that phrase, it was *not* in force and could not be applied to the case, and the effect of that plea and conviction must be decided as though no such change in the law had been made.

Such, however, is not the ground on which the Supreme Court and the Court of Appeals placed their judgment.

"There is nothing," say they, "in this; the change is a change not in crimes, but in criminal procedure, and such changes are not *ex post facto*."

Before proceeding to examine this proposition, it will be well to get some clear perception of the purpose of the convention which framed the Constitution in declaring that no State shall pass any *ex post facto* law.

It was one of the objections most seriously urged against the new constitution by those who opposed its ratification by the States, that it contained no formal Bill of Rights. Federalist, No. lxxxiv. And the State of Virginia accompanied her ratification by the recommendation of an amendment embodying such a bill. 3 Elliot's Debates, 661.

The feeling on this subject led to the adoption of the first ten amendments to that instrument at one time, shortly after the government was organized. These are all designed to operate as restraints on the general government, and most of

them for the protection of private rights of persons and property. Notwithstanding this reproach, however, there are many provisions in the original instrument of this latter character, among which is the one now under consideration.

So much importance did the convention attach to it, that it is found twice in the Constitution, first as a restraint upon the power of the general government, and afterwards as a limitation upon the legislative power of the States. This latter is the first clause of section 10 of article 1, and its connection with other language in the same section may serve to illustrate its meaning. "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make anything but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts; or grant any Title of Nobility."

It will be observed that here are grouped contiguously a prohibition against three distinct classes of retrospective laws; namely, bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts. As the clause was first adopted, the words concerning contracts were not in it, because it was supposed that the phrase *ex post facto* law included laws concerning contracts as well as others. But it was ascertained before the completion of the instrument that this was a phrase which, in English jurisprudence, had acquired a signification limited to the criminal law, and the words "or law impairing the obligation of contracts" were added to give security to rights resting in contracts. 2 Bancroft's History of the Constitution, 213.

Sir Thomas Tomlin, in that magazine of learning, the English edition of 1835 of his Law Dictionary, says: —

"*Ex post facto* is a term used in the law, signifying something done after, or arising from or to affect another thing that was committed before."

"An *ex post facto* law is one which operates upon a subject not liable to it at the time the law was made."

The first case in which this court was called upon to construe this provision of the Constitution was that of *Calder* v. *Bull*, 3 Dall. 386, decided in 1798. The opinion was delivered

by Mr. Justice Chase, and its main purpose was to decide that the provision had no application to acts concerning civil rights. It, however, is important, as it discusses very fully the meaning of the provision in its application to criminal cases. It defines four distinct classes of laws embraced by the clause. "1st, Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d, Every law that aggravates the crime or makes it greater than it was when committed. 3d, Every law that changes the punishment and inflicts a greater punishment than was annexed to the crime when committed. 4th, Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence in order to convict the offender." Again he says: "But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only these that create or aggravate the crime; or increase the punishment or change the rules of evidence for the purpose of conviction."

In the case before us the Constitution of Missouri so changes the rule of evidence, that what was conclusive evidence of innocence of the higher grade of murder when the crime was committed, namely, a judicial conviction for a lower grade of homicide, is not received as evidence at all, or, if received, is given no weight in behalf of the offender. It also changes the punishment, for, whereas the law as it stood when the homicide was committed was that, when convicted of murder in the second degree, he could never be tried or punished by death for murder in the first degree, the new law enacts that he may be so punished, notwithstanding the former conviction.

But it is not to be supposed that the opinion in that case undertook to define, by way of exclusion, all the cases to which the constitutional provision would be applicable.

Accordingly, in a subsequent case tried before Mr. Justice Washington, he said, in his charge to the jury, that "an *ex post facto* law is one which, in its operation, makes that criminal which was not so at the time the action was performed; or which increases the punishment, *or, in short, which, in relation to the offence or its consequences, alters the situation of*

a party to his disadvantage." *United States* v. *Hall*, 2 Wash. 366.

He adds, by way of application to that case, which was for a violation of the embargo laws: "If the enforcing law applies to this case, there can be no doubt that, so far as it *takes away or impairs the defence* which the law had provided the defendant at the time when the condition of this bond became forfeited, it is *ex post facto* and inoperative."

This case was carried to the Supreme Court and the judgment affirmed. 6 Cranch, 171.

The new Constitution of Missouri does take away what, by the law of the State when the crime was committed, was a good defence to the charge of murder in the first degree.

In the subsequent cases of *Cummings* v. *The State of Missouri* and *Ex parte Garland*, 4 Wall. 277, 333, this court held that a law which excluded a minister of the gospel from the exercise of his clerical function, and a lawyer from practice in the courts, unless each would take an oath that they had not engaged in or encouraged armed hostilities against the government of the United States, was an *ex post facto* law, because it punished, in a manner not before punished by law, offences committed before its passage, and because it instituted a new rule of evidence in aid of conviction. This court was divided in that case, the minority being of opinion that the act in question was not a crimes act, and inflicted no punishment, in the judicial sense, for any past crime, but they did not controvert the proposition that if the act had that effect it was an *ex post facto* law.

In these cases we have illustrations of the liberal construction which this court, and Mr. Justice Washington in the Circuit Court, gave to the words *ex post facto* law, — a construction in manifest accord with the purpose of the constitutional convention to protect the individual rights of life and liberty against hostile retrospective legislation.

Nearly all the States of the Union have similar provisions in their constitutions, and whether they have or not, they all recognize the obligatory force of this clause of the Federal Constitution on their legislation.

A reference to some decisions of those courts will show the

same liberality of construction of the provision, many of them going much farther than is necessary to go in this case to show the error of the Missouri courts.

In *Commonwealth* v. *McDonough*, 18 Allen (Mass.), 581, it was held that a law passed after the commission of the offence of which the defendant stood charged, which mitigated the punishment, as regarded the fine and the maximum of imprisonment that might be inflicted, was an *ex post facto* law as to that case, because the minimum of imprisonment was made three months, whereas before there was no minimum limit to the court's discretion. This slight variance in the law was held to make it *ex post facto* and void as to that case, though the effect of the decision was to leave *no* law by which the defendant could be punished, and he was discharged, though found guilty of the offence.

In *Hartung* v. *The People*, 22 N. Y. 95, after the prisoner had been convicted of murder and sentenced to death, and while her case was pending on appeal, the legislature of that State changed the law for the punishment of murder in general, so as to authorize the governor to postpone indefinitely the execution of the sentence of death, and to keep the party confined in the penitentiary at hard labor until he should order the full execution of the sentence or should pardon or commute it.

The Court of Appeals held that, while this later law repealed all existing punishments for murder, it was *ex post facto* as to that case, and could not be applied to it. This was decided in face of the fact that it resulted in the discharge of a convicted murderess without any punishment at all.

Denio, J., in delivering the opinion of the court, makes these excellent observations: —

"It is highly probable that it was the intention of the legislature to extend favor rather than increased severity towards the convict and others in her situation; and it is quite likely that, had they been consulted, they would have preferred the application of this law to their cases rather than that which existed when they committed the offences of which they are convicted. But the case cannot be determined on such considerations. No one can be criminally punished in this country,

except according to a law prescribed for his government before the supposed offence was committed, and which existed as a law at that time. It would be useless to speculate upon the question whether this would be so upon the reason of the thing, and according to the spirit of our legal institutions, because the rule exists in the form of an express written precept, the binding force of which no one disputes. No State shall pass any *ex post facto* law is the mandate of the Constitution of the United States."

This is reaffirmed by the same court in the cases of *Shepherd* v. *People*, 25 N. Y. 406; *Green* v. *Shumway*, 39 id. 418; and *In re Petty*, 22 Kan. 477, decides the same thing. In *State* v. *Keith*, 63 N. C. 140, the Supreme Court of North Carolina held that a law repealing a statute of general amnesty for offences arising out of the rebellion was *ex post facto* and void, though both statutes were passed after the acts were committed with which the defendant was charged.

In *State* v. *Sneed*, 25 Tex. Supp. 66, the court held that in a criminal case barred by the Statute of Limitations, a subsequent statute which enlarged the time necessary to create a bar was, as to that case, an *ex post facto* law, and it could not be supposed to be intended to apply to it.

When, in answer to all this evidence of the tender regard for the rights of a person charged with crime under subsequent legislation affecting those rights, we are told that this very radical change in the law of Missouri to his disadvantage is not subject to the rule because it is a change, not in crimes, but in criminal procedure, we are led to inquire what that court meant by criminal procedure.

The word "procedure," as a law term, is not well understood, and is not found at all in Bouvier's Law Dictionary, the best work of the kind in this country. Fortunately a distinguished writer on Criminal Law in America has adopted it as the title to a work of two volumes. Bishop on Criminal Procedure. In his first chapter he undertakes to define what is meant by procedure. He says: "S. 2. The term 'procedure' is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms, Pleading, Evidence, and Prac-

tice." And in defining Practice, in this sense, he says: "The word means those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in;" and Evidence, he says, as part of procedure, "signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted."

If this be a just idea of what is intended by the word "procedure" as applied to a criminal case, it is obvious that a law which is one of procedure may be obnoxious as an *ex post facto* law, both by the decision in *Calder* v. *Bull*, 3 Dall. 386, and in *Cummings* v. *The State of Missouri*, 4 Wall. 277; for in the former case this court held that "any law which alters the legal rules of evidence, and receives less or different testimony than the law requires at the time of the commission of the offence, in order to convict the offender," is an *ex post facto* law; and in the latter, one of the reasons why the law was held to be *ex post facto* was that it changed the rule of evidence under which the party was punished.

But it cannot be sustained without destroying the value of the constitutional provision, that a law, however it may invade or modify the rights of a party charged with crime, is not an *ex post facto* law, if it comes within either of these comprehensive branches of the law designated as Pleading, Practice, and Evidence.

Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed to the disadvantage of the prisoner by State legislation after the offence was committed, and such legislation not held to be *ex post facto* because it relates to procedure, as it does according to Mr. Bishop?

And can any substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot.

Some light may be thrown upon this branch of the argument by a recurrence to a few of the numerous decisions of the highest courts construing the associated phrase in the same sentence

of the Constitution which forbids the States to pass any law impairing the obligation of contracts. It has been held that this prohibition also relates exclusively to laws passed after the contract is made, and its force has been often sought to be evaded by the argument that laws are not forbidden which affect only the *remedy*, if they do not change the nature of the contract, or act directly upon it.

The analogy between this argument and the one concerning laws of procedure in relation to the contiguous words of the Constitution is obvious. But while it has been held that a change of remedy made after the contract may be valid, it is only so when there is substituted an adequate and sufficient remedy by which the contract may be enforced, or where such remedy existed and remained unaffected by the new law. *Tennessee* v. *Sneed*, 96 U. S. 69.

On this point it has been held that laws are void enacted after the date of the contract: —

1. Which give the debtor a longer stay of execution after judgment. *Blair* v. *Williams*, 4 Litt. (Ky.) 34; *McKinney* v. *Carroll*, 5 Mon. (Ky.) 96.

2. Which require on a sale of his property under execution an appraisement, and a bid of two-thirds the value so ascertained. *Bronson* v. *Kinzie*, 1 How. 311; *McCracken* v. *Hayward*, 2 id. 608; *Sprott* v. *Reid*, 3 Greene (Iowa), 489.

3. Which allow a period of redemption after such sale. *Lapsley* v. *Brashears*, 4 Litt. (Ky.) 47; *Cargill* v. *Power*, 1 Mich. 369; *Robinson* v. *Howe*, 13 Wis. 341.

4. Which exempt from sale under judgment for the debt a larger amount of the debtor's property than was exempt when the debt was contracted. *Edwards* v. *Kearzey*, 96 U. S. 595, and the cases there cited; Story's Commentary on the Constitution, sect. 1385.

There are numerous similar decisions showing that a change of the law which hindered or delayed the creditor in collecting his debt, though it related to the remedy or mode of procedure by which it was to be collected, impaired the obligation of the contract within the meaning of the Constitution.

Why is not the right to life and liberty as sacred as the right growing out of a contract? Why should not the contig-

uous and associated words in the Constitution, relating to retroactive laws, on these two subjects, be governed by the same rule of construction? And why should a law, equally injurious to the rights of the party concerned, be under the same circumstances void in one case and not in the other?

But it is said that at the time the prisoner pleaded guilty of murder in the second degree, and at the time he procured the reversal of the judgment of the criminal court on that plea, the new constitution was in force, and he was bound to know the effect of the change in the law on his case.

We do not controvert the principle that he was bound to know and take notice of the law. But as regards the effect of the plea and the judgment on it, the Constitution of Missouri made no change.

It still remained the law of Missouri, as it is the law of every State in the Union, that so long as the judgment rendered on that plea remained in force, or after it had been executed, the defendant was liable to no further prosecution for any charge found in that indictment.

Such was the law when the crime was committed, such was the law when he pleaded guilty, such is the law now in Missouri and everywhere else. So that, in pleading guilty under an agreement for ten years' imprisonment, both he and the prosecuting attorney and the court all knew that the result would be an acquittal of all other charges but that of murder in the second degree.

Did he waive or annul this acquittal by prosecuting his writ of error? Certainly not by that act, for if the judgment of the lower court sentencing him to twenty-five years' imprisonment had been affirmed, no one will assert that he could still have been tried for murder in the first degree. Nor was there anything else done by him to waive this acquittal. He refused to withdraw his plea of guilty. It was stricken out by order of the court against his protest. He refused then to plead not guilty, and the court in like manner, against his protest, ordered a general plea of not guilty to be filed. He refused to go to trial on that plea, and the court forced him to trial.

The case rests, then, upon the proposition that, having an

erroneous sentence rendered against him on the plea accepted by the court, he could only take the steps which the law allowed him to reverse that sentence at the hazard of subjecting himself to the punishment of death for another and a different offence of which he stood acquitted by the judgment of that court.

That he prosecuted his legal right to a review of that sentence with a halter around his neck, when, if he succeeded in reversing it, the same court could tighten it to strangulation, and if he failed, it did him no good. And this is precisely what has occurred. His reward for proving the sentence of the court of twenty-five years' imprisonment (not its judgment on his guilt) to be erroneous, is that he is now to be hanged instead of imprisoned in the penitentiary. No such result could follow a writ of error before, and as to this effect the new constitution is clearly *ex post facto*. The whole error, which results in such a remarkable conclusion, arises from holding the provision of the new constitution applicable to this case, when the law is *ex post facto* and inapplicable to it.

If Kring or his counsel were bound to know the law when they prosecuted the writ of error, they were bound to know it as we have expounded it. If they knew that by the *words* of the new constitution such a judgment of acquittal as he had when he undertook to reverse it would be no longer an acquittal after it was reversed, they also knew that, being as to his case an *ex post facto* law, it could have no such effect on that judgment.

We are of opinion that any law passed after the commission of an offence which, in the language of Mr. Justice Washington, in *United States* v. *Hall*, "in relation to that offence, or its consequences, alters the situation of a party to his disadvantage," is an *ex post facto* law; and in the language of Denio, J., in *Hartung* v. *The People*, "No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offence was committed, and which existed as a law at the time."

Tested by these criteria, the provision of the Constitution of Missouri which denies to plaintiff in error the benefit which the previous law gave him of acquittal of the charge of murder in the first degree, on conviction of murder in the second

degree, is, as to his case, an *ex post facto* law within the meaning of the Constitution of the United States, and for the error of the Supreme Court of Missouri, in holding otherwise, its judgment will be reversed, and the case remanded to it, with direction to reverse the judgment of the Criminal Court of St. Louis, and for such further proceedings as are not inconsistent with this opinion; and it is

So ordered.

MR. JUSTICE MATTHEWS, with whom concurred MR. CHIEF JUSTICE WAITE, MR. JUSTICE BRADLEY, and MR. JUSTICE GRAY, dissenting.

The Chief Justice, Mr. Justice Bradley, Mr. Justice Gray, and myself are unable to concur in the judgment and opinion of the court in this case, and the importance of the question determined constrains us to state the grounds of our dissent. The material facts are these: The plaintiff in error, at March Term, 1875, of the St. Louis Criminal Court, was indicted for murder in the first degree. On his arraignment he pleaded "not guilty." At the November Term of the same year a trial was had, which resulted in a verdict of guilty of murder in the first degree, and a sentence of death. That judgment was reversed on appeal, and twice subsequently there were mistrials. On Nov. 12, 1879, the defendant, by consent of the circuit attorney and leave of the court, withdrew his plea of not guilty and entered a plea of guilty of murder in the second degree. He was thereupon sentenced to imprisonment in the penitentiary for a term of twenty-five years. The prisoner then filed a motion to set aside this judgment and sentence, and to allow him to withdraw the plea of guilty of murder in the second decree and to permit him "to have his original plea of not guilty entered of record to the end that he may have a trial upon the merits of his case before a jury." In support of this motion reasons were assigned, in substance, that he had withdrawn his original plea of not guilty and entered the plea of guilty of murder in the second degree, upon the faith of an understanding previously had with the circuit attorney representing the prosecution, that if he would do so the sentence should not exceed ten years in the penitentiary, which under-

standing was violated by the sentence complained of. The court overruled the motion, but on appeal the judgment was reversed on the ground alleged by the prisoner, that he had been misled, and the cause was remanded for further proceedings. On receipt of this mandate, the trial court, the prisoner refusing to withdraw his plea of guilty of murder in the second degree and to enter a plea of not guilty, entertained the motion previously made by him, for refusing to grant which the judgment had thus been reversed, and granted it, setting aside the plea of guilty, and, the prisoner standing mute, ordered a plea of not guilty to be entered. On this plea a trial was had at October Term, 1881, when he was found guilty of murder in the first degree and again sentenced to death. An appeal was prosecuted from this judgment, which, however, was affirmed by the Supreme Court of Missouri, and is brought here for examination by the present writ of error, on the ground that it has been rendered in violation of a right secured to him by the Constitution of the United States.

The right which it is alleged has been violated is supposed to arise in this way. At the time of the commission of the offence in 1875, it was well established as the law of Missouri, by the decisions of the Supreme Court of the State, that "when a person is indicted for murder in the first degree, and is put upon his trial and convicted of murder in the second degree and a new trial is ordered at his instance, he cannot legally be put upon his trial again for the charge of murder in the first degree; he can be put upon his trial only upon the charge of murder in the second degree." *State* v. *Ross*, 29 Mo. 32; *State* v. *Smith*, 53 id. 139. And it is not denied that a plea of guilty of murder in the second degree, accepted by the State, would have been at that time equally an acquittal of the charge of murder in the first degree, having the same force as to future trials as a conviction of murder in the second degree, although the judgment should be reversed on the application of the prisoner.

On Nov. 30, 1875, the State of Missouri adopted a new constitution, which contained (sect. 23, art. 2) the provision, that, "if judgment on a verdict of guilty be reversed for error in law, nothing herein contained shall prevent a new trial of the

prisoner on a proper indictment, or according to correct principles of law."

In the case of *State* v. *Simms*, 71 Mo. 538, it was decided that this provision overthrows the rule laid down in the case of *State* v. *Ross*, *ubi supra*, and was "equivalent to declaring that when such judgment is reversed for error at law, the trial had is to be regarded as a mistrial, and that the cause, when remanded, is put on the same footing as a new trial, as if the cause had been submitted to a jury, resulting in a mistrial by the discharge of the jury in consequence of their inability to agree on a verdict."

The rule thus introduced by the Constitution of 1875 was the one applied in the trial of the prisoner, instead of that previously in force; and the contention is, that to apply it in a case such as the present, where the alleged offence was committed prior to the adoption of the new constitution, is to give it operation as an *ex post facto* law, in violation of the prohibition of the Constitution of the United States.

In examining this proposition it must constantly be borne in mind, that the plea of guilty of murder in the second degree, the legal effect of which, when admitted, is the precise subject of the question, was entered long after the new rule established by the Constitution of Missouri took effect; that the prisoner himself moved to set it aside, and for leave to renew his plea of not guilty, on the ground that he had been misled into making his plea of guilty under circumstances that would make it operate as a fraud upon his rights, if it were permitted to stand; and that, because the court denied this motion, he made and prosecuted his appeal for a reversal of its judgment, in full view of the rule, then in force, of the application of which he now complains, which expressly declared what should be the effect of such a reversal.

The classification of *ex post facto* laws first made by Mr. Justice Chase, in *Calder* v. *Bull*, 3 Dall. 386, 390, seems to have been generally accepted. It is as follows: "1st, Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d, Every law that aggravates a crime or makes it greater than it was when committed. 3d, Every law that

changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4th, Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender." This definition was the basis of the opinion of the court in *Cummings* v. *The State of Missouri*, 4 Wall. 277, and *Ex parte Garland*, id. 333, and was expressly relied on in the opinion of the dissenting judges, which says: "This exposition of the nature of *ex post facto* laws has never been denied, nor has any court or any commentator on the Constitution added to the classes of laws here set forth, as coming within that clause of the organic law." p. 391.

Now, under which of these heads does the controverted rule of the Missouri Constitution fall? It cannot be contended that it is embraced in either of the first three. If in any, it must be covered by the fourth. But what rule of evidence, existing at the time of the commission of the offence, is altered to the disadvantage of the prisoner? The answer made is this: that, at that time, an accepted plea of guilty of murder in the second degree was conclusive proof that the prisoner was not guilty of murder in the first degree, and that it was abrogated, so as to deprive the prisoner of the benefit of it. But while that rule was in force, the prisoner had no such evidence of which he could avail himself. How, then, has he been deprived of any benefit from it? He had not, during the period while the rule was in force, entered any plea of guilty of murder in the second degree, and no such plea had been admitted by the State. All that can be said is, that if, while the rule was in force he had entered such a plea with the consent of the State, its legal effect would have been as claimed, and by its change he has lost what advantage he would have had in such a contingency. But it does not follow that such a contingency would have happened. It was not within the power of the prisoner to bring it about, for it required the concurrence and consent of the State; and it cannot be assumed that, under such a rule and in such a case, that consent would have been given. It is not enough to say that, under a ruling of the court, a party might have lost the benefit of certain evidence,

if such evidence had existed. To predicate error in such a case, it must be shown that the party had evidence of which, in fact, he has been illegally deprived. Such a case would have been presented here, if the plea of guilty of murder in the second degree had been entered and accepted before the Constitution of 1875 took effect and while the old rule was in force. Then the law would have taken effect upon the transaction between the prisoner and the prosecution, in the acceptance of his plea; the *status* of the prisoner would have been fixed and declared; he would have stood acquitted of record of the charge of murder in the first degree; and the new rule would have been an *ex post facto* law if it had made him liable to conviction and punishment for an offence of which by law he had been declared to be innocent.

But, in the circumstances of the present case, the evidence, of which it is said the prisoner has been deprived, came into being after the law had been changed. It was evidence created by the law itself, for it consists simply in a technical inference; and the law in force when it was created necessarily determines its quality and effect. That law did not operate upon the offence to change its character; nor upon its punishment to aggravate it; nor upon the evidence which, according to the law in force at the time of its commission, was competent to prove or disprove it. It operated upon a transaction between the prisoner and the prosecution, which might or might not have taken place; which could not take place without mutual consent; and when it did take place, that consent must be supposed to have been given by both with reference to the law as it then existed, and not with reference to a law which had then been repealed.

It is the essential characteristic of an *ex post facto* law that it should operate retrospectively, so as to change the law in respect to an act or transaction already complete and past. Such is not the effect of the rule of the Constitution of Missouri now in question. As has been shown, it does not, in any particular, affect the crime charged, either in its definition, punishment, or proof. It simply declares what shall be the legal effect, in the future, of acts and transactions thereafter taking place. It enacts that any future erroneous and unlaw-

ful conviction for a less offence, thereafter reversed on the application of the accused, shall be held for naught, to all intents and purposes, and shall not, after such reversal, operate as a technical acquittal of any higher grade of crime, for which there might have been a conviction under the same indictment. It imposes upon the prisoner no penalty or disability. It cannot affect the case of any individual, except upon his own request, for he must take the first step in its application. When he pleads guilty of murder in the second degree, he knows that its acceptance cannot operate as an acquittal of the higher offence. When he asks to have the conviction reversed, he understands that if his application is granted, the judgment must be set aside with the same effect as if it had never been rendered. It does not touch the substance or merits of his defence, and is in itself a sensible and just rule in criminal procedure.

And, "so far as mere modes of procedure are concerned," says Judge Cooley, Const. Lim. 272, "a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts, in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime. Statutes giving the government additional challenges, and others which authorized the amendment of indictments, have been sustained and applied to past transactions, as doubtless would be any similar statute calculated merely to improve the remedy, and in its operation working no injustice to the defendant and depriving him of no substantial right." Accordingly it was held by this court, in *Gut* v. *The State*, 9 Wall. 35, in the language of Mr. Justice Field, delivering its opinion, that "a law changing the place of trial from one county to another

county in the same district, or even to a different district from that in which the offence was committed or the indictment found, is not an *ex post facto* law, though passed subsequent to the commission of the offence or the finding of the indictment." And in the case of *Ex parte McCardle*, 7 Wall. 506, it was the unanimous decision of the court, that it was competent for Congress, in a case affecting personal liberty, to deprive the complaining party of the benefit of an appeal from the judgment of an inferior court, after his appeal had taken effect and while it was pending. It would have been equally competent for the Constitution of Missouri to have declared that no appeal or writ of error should thereafter be allowed to reverse the judgment of the court of original jurisdiction in any pending criminal cause, which certainly would be giving a different, because irreversible, effect to that judgment from what such judgments would have had under the law in force when the offence was committed. If it be true, in the logic of the law, as it is in all its other applications, that the greater includes the less, then it was competent for that constitution to provide that, as to all judgments in criminal cases thereafter rendered, which should be reversed for error, on the appeal of the defendant, the effect of the reversal should be such as not to be a bar to a subsequent conviction for any crime described in the indictment; for that would have been to say, not that there shall be no appeal at all, but that if an appeal is taken its effect shall only be such as is prescribed in the law allowing it.

In *Commonwealth* v. *Holley*, 8 Gray (Mass.), 458, Shaw, C. J., said: "The object of the Declaration of Rights was to secure substantial privileges and benefits to parties criminally charged; not to require particular forms, except where they are necessary to the purposes of justice and fair dealing towards persons accused, so as to insure a full and fair trial." And in *Commonwealth* v. *Hall*, 97 Mass. 570, the court, speaking of a statutory provision authorizing the amendment of indictments, so as to allege a former conviction, the effect of which was to increase the penalty, said: "We entertain no doubt of the constitutionality of this section, which promotes the ends of justice by taking away a purely technical objection, while

it leaves the defendant fully and fairly informed of the nature of the charge against him, and affords him ample opportunity for interposing every meritorious defence. Technical and formal objections of this nature are not constitutional rights." These observations, it is not necessary to point out, are entirely applicable to the present argument.

Still stronger and more to the point is what was said by Shaw, C. J., in *Jacquins* v. *Commonwealth*, 9 Cush. (Mass.) 279, where it was held that a statute authorizing the Supreme Judicial Court, on a writ of error, on account of error in the sentence, to render such judgment therein as should have been rendered, applied to past judgments, and was not, on that account, an *ex post facto* law. That eminent judge said: "It was competent for the legislature to take away writs of error altogether, in cases where the irregularities are formal and technical only, and to provide that no judgment should be reversed for such cause. It is more favorable to the party to provide that he may come into court upon the terms allowed by this statute, than to exclude him altogether. This act operates like the act of limitations. Suppose an act was passed that no writ of error should be taken out after the lapse of a certain period. It is contended that such an act would be unconstitutional, on the ground that the right of the convict to have his sentence reversed upon certain conditions had once vested. But this argument overlooks entirely the well-settled distinction between rights and remedies."

Precisely the same distinction between laws *ex post facto* and those which merely affect the remedy, and are, therefore, applicable to the case of an offence previously committed, is well illustrated by the case of *Ratzky* v. *The People*, 29 N. Y. 124. There the prisoner had been convicted of murder in the first degree; the offence was committed when the act of 1860 was in force, which prescribed the mode of punishment; he was sentenced, however, in accordance with the terms of an act passed in 1862, subsequently to the commission of the offence, and which prescribed a different mode of punishment. On this account the judgment was held to be erroneous and was reversed, on the ground that the act of 1862, applied to offences previously committed, was *ex post facto*. But at the

time of the commission of the offence, in 1861, it was the well-settled law of New York, as decided in *Shepherd* v. *The People*, 25 N. Y. 406, that when a wrong judgment had been pronounced, although the trial and conviction were regular, the prisoner could not, on reversal of the judgment, be subject to another trial, but would be entitled to his discharge. But, on April 24, 1863, after the prisoner had been tried and convicted, but before judgment and sentence were pronounced, an act of the legislature took effect, which provided that the appellate court should have power, upon any writ of error, when it should appear that the conviction had been legal and regular, to remit the record to the court in which such conviction had been had, to pass such sentence thereon as the appellate court should direct. But for the authority conferred by this act, the Court of Appeals stated that it would have had no power, upon reversal of the judgment of the Supreme Court, either to pronounce the appropriate judgment, or remit the record to the oyer and terminer to give such judgment; but, on the contrary, would have been obliged to have discharged him, the law not authorizing another trial. Nevertheless, the Court of Appeals gave effect to the act of 1863, reversed the judgment, and sent the record down with directions to sentence the prisoner to death, in accordance with the provisions of the act of 1860, holding that the act of 1863 was not an *ex post facto* law. And yet it deprived the prisoner of the benefit of a rule of law, in force at the time the offence was committed; viz., that if he should be erroneously sentenced and the judgment should be reversed, he would be entitled to be discharged and forever after protected against further prosecution for the same offence, as well as against any second judgment upon the same verdict.

This decision deserves particular consideration, for it involves the very question under discussion. At the time of the commission of his offence, and at the time of his trial and conviction, a rule of law in New York had been well established, that upon a reversal of judgment in a capital case, for error in the sentence, the prisoner was entitled to be discharged, and his former conviction, notwithstanding the reversal, was a conclusive defence upon any subsequent trial for the same offence. After trial and conviction a statute was passed which abrogated

that rule and declared that a subsequent reversal of judgment for error merely in the sentence should not have that effect, but that, even without a new trial, a new judgment might be entered upon the verdict. This gave to the verdict and to the subsequent proceeding an effect entirely different from what they would have had under the law as it stood at the time of the commission of the offence, and deprived the prisoner of the advantage of the rule then in force. After that statute took effect he prosecuted a writ of error and reversed the judgment for error in the sentence, and it was held that the effect of that reversal was determined by the law in force when it was rendered, and not by the law in force when the trial and verdict were had and when the offence was committed.

Davies, J., said, p. 132: "It would follow from these considerations and the authority of the case of *The People* v. *Shepherd*, 25 N. Y. 406, that a wrong judgment having been pronounced, although the trial and conviction were regular, this prisoner could not be subjected to another trial and would be entitled to his discharge. That would unquestionably be so but for the act of April 24, 1863. . . . In the present case that act became operative before the judgment and sentence were pronounced and given and before the writ of error was prosecuted to this court. It was, therefore, in force when the writ of error in this case was prosecuted, and its provisions are applicable to the duty imposed upon this tribunal by virtue of that proceeding. . . . But for the authority conferred upon this court by that statute it would have had no power, upon reversal of the judgment of the Supreme Court, either to pronounce the appropriate judgment or remit the record to the oyer and terminer to give such judgment."

And Denio, C. J., said: "The remaining question is, whether the judgment should be reversed and the prisoner discharged, according to the former rule, or the record be remitted to the oyer and terminer to pass a legal sentence upon the conviction. This latter course is now authorized by statute. Laws 1863, c. 226, p. 406. The conviction was legal and the sentence only was erroneous. The only question is, whether the act, having been passed after the conviction, though before judgment was given in the Supreme Court, could be applied to the

case. I am of opinion that it can be applied. The forms of judicial proceedings are under the control of the legislature." And the court accordingly, instead of ordering the prisoner to be discharged, according to the rule in force at the time the offence was committed, and even at the time of his trial and conviction, directed the record to be remitted to the Court of Oyer and Terminer with instructions to sentence him to suffer death for the crime of which he had been convicted.

The counterpart and complement of the decision in Ratzky's case are found in *Hartung* v. *The People.* There the prisoner had been convicted of murder and sentenced to death; but at the time the judgment was rendered the law in force at the time of the commission of the offence providing for its punishment had been repealed, and the repealing act substituted a different punishment. It was on this account adjudged to be an *ex post facto* law and void, and the judgment was reversed. 22 N. Y. 95. Subsequently the repealing act was itself repealed, and the former act in force when the offence was committed was restored. Then the prisoner was again tried, having pleaded a former conviction, but was found guilty and adjudged to suffer death in accordance with the law existing at the time the offence was committed. This judgment was thereupon reversed, and the prisoner ordered to be discharged, on the ground that the act restoring the law as it stood when the offence was committed was an *ex post facto* law, because at the time it was passed the prisoner had been adjudged to be legally free from punishment of any kind on account of her offence. 26 id. 167. The very point of the decision was, that while it was competent for the legislature to repeal the repealing act so that it could not thereafter be availed of, it could not destroy the effect of a judgment actually pronounced, while that act was in force. It is manifest that if in that case the prisoner had not been tried at all until after the law had been thus twice changed, she could not have claimed to have had the vested interest in the first repealing act, which was allowed to her in the judgment actually rendered when it was in force. It was because the subsequent law, if applied, would have changed the legal effect of that judgment, that it was adjudged to be an *ex post facto* law.

It was precisely upon this principle that the Supreme Court of North Carolina proceeded in the case of *State* v. *Keith*, 63 N. C. 140. There the prisoner, in custody on a charge of murder, moved for a discharge, on the ground that his offence was within the provisions of the amnesty act of 1866–67. This was admitted to be the case, but the motion was opposed on the ground that the amnesty act had been repealed. It was held that the effect of the pardon was, so far as the State was concerned, to destroy and entirely efface the previous offence, as if it had never been committed; and that to give to the repeal of the amnesty act the effect, as claimed, of reviving the offence, would make it an *ex post facto* law, making criminal that which, when it took effect, was not so, and taking from the prisoner his vested right to immunity.

But suppose in that case the provisions of the amnesty act had been conditional and not absolute, so that no one could plead its pardon unless he had taken certain formal preliminary steps to obtain the benefit of its terms, and that before the prisoner had done so the act had been repealed. Could it be claimed that in that event he had obtained a vested right to immunity, and that its repeal operated as an *ex post facto* law? Clearly not. And in reference to this case, it is also to be observed, that the fact, the legal character of which was changed by the subsequent law, was the fact of pardon, and not a fact which existed at the time of the commission of the offence. The repealing act was *ex post facto*, because it had the effect to change the legal character of the facts as they existed at the time of its passage.

In *State* v. *Arlin*, 39 N. H. 179, a prisoner was indicted for a robbery, which at the time of its commission was punishable by imprisonment for life; but by the same law he was entitled to have counsel assigned him by the government, process to compel the attendance of witnesses, and other similar privileges. A subsequent law mitigated the severity of the punishment and repealed the act giving these privileges. It was held that the act was not *ex post facto*, because it changed the punishment to the advantage of the prisoner, and that he was not entitled to the incidental benefits secured by the law in force when the offence was committed. The court remarked, that

by committing the offence the prisoner had not acquired a vested right to enjoy the privileges to which he would have been entitled if tried under the law subjecting him to imprisonment for life.

The rule of law in Missouri, the benefit of which is claimed for the prisoner in this proceeding, notwithstanding its repeal by the Constitution of the State before it could have been applied in his case, was established, not by statute, but by a series of judicial decisions of the Supreme Court of the State. Those decisions might at any time have been reversed by the same tribunal, and a new rule introduced, such as that actually declared by the Constitution. In that event, could it be said, with any plausibility, that the later decisions, reversing the law as previously understood, could not be applied to all subsequent proceedings in cases where, upon a plea of guilty of murder in the second degree thereafter entered and accepted, an erroneous judgment thereon had been reversed, notwithstanding, when the offence was committed, the prior decisions had been in force? Would the new rule, as introduced and applied by the later judicial decisions, be in violation of the prohibition of the Constitution of the United States against *ex post facto* laws? But the Constitution of Missouri has done no more than this.

The nature and operation of the rule are not affected by any peculiarity in the authority which establishes it. If it is not objectionable as an *ex post facto* law, when introduced by judicial decision, it is because it is not so in its nature; and, if not, it does not become so when introduced by a legislative declaration.

There are doubtless many matters of mere procedure which are of vital consequence; but in respect to them the power of Congress, as to crimes against the United States, is restrained by positive and specific limitations, carefully inserted in the organic law, prohibiting unreasonable searches and seizures, and general warrants, providing that no one shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the military service; that no person shall, for the same offence, be twice put in jeopardy of life or limb, nor be compelled to testify against himself; that every accused person shall be secured in the right to a public trial by an impartial

jury in a previously ascertained district, in which the alleged offence is charged to have been committed; to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence. But these are limitations upon the legislative power of the United States, whether prospective or retrospective, and not upon that of the States; and although the constitutions of all the States probably have equivalent guarantees of individual rights, the violation of none of them by a State tribunal, under State legislation, could present a case for the exercise of supervisory jurisdiction by this court. The prohibition against bills of attainder is the only one of this class which applies to both the government of the United States and those of the States; and while a bill of attainder may be an *ex post facto law*, it is not necessarily so, as it may be merely a matter of procedure, a trial by a legislative instead of a judicial body.

But, in addition to these matters of procedure, which are specially protected against legislative change, either for the past or the future, there may be others, in which changes with a retrospective effect are forbidden by the prohibition against *ex post facto* laws. Such, we have already seen, would be laws which authorize conviction upon less evidence than was required at the time of the commission of the offence, or which altered, to the disadvantage of the accused, the nature and quantity of proof at that time required to substantiate a legal defence; or which, in other words, gave to the circumstances which constituted and attended the act a legal signification more injurious to the accused than was attached to them by the law existing at the time of the transaction.

It is doubtless quite true that it is difficult to draw the line in particular cases beyond which legislative power over remedies and procedure cannot pass without touching upon the substantial rights of the parties affected, as it is impossible to fix that boundary by any general words. The same difficulty is encountered, as the same principle applies, in determining, in civil cases, how far the legislature may modify the remedy without impairing or enlarging the obligation of contracts. Every case must be decided upon its own circumstances, as the

question continually arises and requires an answer. But it is a familiar principle, that, before rights derived under public laws have become vested in particular individuals, the State, for its own convenience and the public good, may amend or repeal the law without just cause of complaint. "The power that authorizes or proposes to give," said Woodbury, J., in *Merrill* v. *Sherburne*, 1 N. H. 199, 213, "may always revoke before an interest is perfected in the donee." Accordingly the heir apparent loses no legal right if, before descent cast, the law of descents is changed so as to shift the inheritance to another, however his expectations may be disappointed. And while it would be a violation of the constitutional maxim which forbids retrospective legislation inconsistent with vested rights to deprive, by a repeal of statutes of limitation, a defendant of a defence which had become perfect while they were in force; yet if, before the bar had become complete, he should be deprived of an expected defence, by an extension of time in which suit might be brought, he would have no just cause to object that he was compelled to meet the case of his adversary upon its merits.

In respect to criminal offences it is undoubtedly a maxim of natural justice, embodied in constitutional provisions, that the quality and consequences of an act shall be determined by the law in force when it is committed, and of which, therefore, the accused may be presumed to have knowledge, so that the definition of the offence, the character and degree of its punishment, and the amount and kind of evidence necessary to prove it, cannot be changed to the disadvantage of the party charged, *ex post facto*. And this equally applies to, because it includes, the matters which, existing at the time and constituting part of the transaction, affect its character, and thus form grounds of mitigation or defence; for the accused is entitled to the benefit of all the circumstances that attended his conduct, according to their legal significance, as determined at the time. All these are incidents that belong to the substance of the thing charged as a crime, and therefore come within the saving which preserves the legal character of the principal fact. But matters of possible defence, which accrue under provisions of positive law, which are arbitrary and technical, introduced for public convenience or from motives of policy,

which do not affect the substance of the accusation or defence, and form no part of the *res gestæ*, are continually subject to the legislative will, unless, in the mean time, by an actual application to the particular case, the legal condition of the accused has been actually changed. His right to maintain that *status*, when it has become once vested, is beyond the reach of subsequent law.

The present, as we have seen, is not such a case. The substance of the prisoner's defence, upon the merits, has not been touched; no vested right under the law had wrought a result upon his legal condition before its repeal. He is, therefore, in no position to invoke the constitutional prohibition, which is, by the judgment of this court, now interposed between him and the crime of which he has been convicted.

In our opinion, the judgment of the Supreme Court of Missouri should be affirmed.

BOWDEN v. JOHNSON.

1. Where the holder of shares of stock in a national bank, who is possessed of information showing that there is good ground to apprehend the failure of the bank, colludes with an irresponsible person, with the design of substituting the latter in his place, and thus escaping the individual liability imposed by the provisions of sect. 12 of the act of June 3, 1864, c. 106, and transfers his shares to such person, the transaction is a fraud on the creditors of the bank, and the liability of the transferrer to them is not thereby affected.
2. A bill in equity filed by the receiver of the bank against the transferrer and transferee to enforce such liability will lie where it is for discovery as well as relief, the transfer being good between the parties, and only voidable at the election of the complainant.
3. A letter of the Comptroller of the Currency, addressed to the receiver, directing him to bring suit to enforce the personal liability of every person owning stock at the time the bank suspended, is sufficient evidence that the decision of the Comptroller touching such personal liability preceded the institution of the suit. The liability bears interest from the date of the letter.
4. The decree below, dismissing the bill, was entered after a new receiver had been appointed. An appeal to this court was taken in the name of the old receiver, as the complainant, the new receiver becoming a surety in the appeal bond. In this court the new receiver was, on his motion, substituted as the complainant and appellant, without prejudice to the proceedings already had; and the motion of the appellees to dismiss the appeal was denied.

APPEAL from the Circuit Court of the United States for the District of New Jersey.

The case is stated in the opinion of the court.

Mr. John A. J. Creswell for the appellant.

Mr. Thomas N. McCarter for the appellees.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

George E. Bowden, as receiver of the First National Bank of Norfolk, Virginia, brought this suit in equity against Jacob C. Johnson and Mrs. B. Valentine, alleging, in the bill, that Johnson, owning one hundred and thirty shares of the capital stock of the bank, of $100 each, in order to exonerate himself from liability to the creditors of the bank, transferred said shares to Mrs. B. Valentine, on the books of the bank; that the transfer was made without legal consideration, and with a view to such exoneration; that Mrs. B. Valentine is, and was known by Johnson, at the time of the transfer, to be, utterly insolvent; that the transfer was made with a view of defrauding the creditors of the bank, and, therefore, was and is void; and that the plaintiff had been appointed, by the Comptroller of the Currency, receiver of the bank, and had been directed by said Comptroller to proceed to enforce the personal liability of all persons owning the capital stock of the bank on the 26th of May, 1874, the day on which the bank failed to redeem one of its circulating notes and was in default in the payment of its circulating notes generally. The bill alleges that Johnson visited Norfolk for the purpose of examining into the condition of the affairs of the bank, and, becoming satisfied from such examination, and from other information in relation to the bank, that its affairs were in a critical condition, as in fact they were, and that a suspension of the bank was inevitable, returned to New York and immediately thereafter made said transfer. The prayer of the bill is, that Johnson and Mrs. B. Valentine answer it on oath; that the transfer of the stock be set aside; and that Johnson be decreed to pay to the plaintiff, as such receiver, the par value of the one hundred and thirty shares.

The joint answer of the defendants admits that Johnson

became the owner of the one hundred and thirty shares in 1869. It avers that he visited Norfolk in November, 1873, but not for the purpose of examining into the condition and affairs of the bank. It denies that he, on said visit, became satisfied that the affairs of the bank were in a critical condition and that a suspension of the bank was inevitable. It avers that he went to Norfolk, at that time, to inspect a farm which it was proposed to exchange with him for said stock. It denies that he "then, during that visit, or at any other time, saw anything in the condition of the said bank," except that William Lamb, who was at that time the president of the said bank, and who went with Johnson to inspect said farm, at the same time proposed that Johnson should lend to the bank $25,000, and proposed to secure the loan by mortgage on the real estate of the bank, which loan Johnson declined to make. Johnson admits that he, on Dec. 5, 1873, sent his said stock to the bank, with the power and direction to have the same transferred to Mrs. Valentine, but he denies expressly that such transfer was made in order to exonerate himself from liability to the creditors of the bank. The answer avers that the actual transfer of the stock, on the books of the bank, was delayed for some time, without the knowledge and against the will of the defendants. It denies that the transfer of the stock was made without legal consideration, or with any view to exonerate Johnson from liability as stockholder. It denies that the defendant Valentine is or was, at the time of said transfer, known by Johnson "to be utterly insolvent, or that such transfer was made with a view of defrauding the creditors" of the bank. It avers that it is not true that Mrs. Valentine was, at the time of said transfer, insolvent, or that said transfer was made for any such purpose as is alleged in the bill, but avers that it was made in good faith and for a valuable and lawful consideration.

The principal question in this case is as to the circumstances attending the transfer of the stock to Mrs. Valentine. This question divides itself into two branches: 1. The information which Johnson had in regard to the affairs of the bank; 2. The real nature of the transaction between Johnson and Mrs. Valentine.

1. Lamb, the president of the bank, gives the following tes-

timony: In the latter part of 1873, Lamb, owing to the straitened condition of the bank, was anxious to make a loan on its real estate, and wrote to Mr. Cole, the former president, then living in New York, to assist him in doing so. Cole wrote to Lamb that he had a friend, Johnson, who he thought was able to make the loan, and would do so if proper representation could be made to him, and that he would bring Johnson down to Norfolk. Some time in November, 1873, Johnson went to Norfolk with Cole, when Lamb endeavored to get Johnson to make a loan on the banking building of the bank. Lamb told Johnson that the need of a loan was urgent, that he thought the security was good, and he appealed to Johnson as a stockholder to make the loan. Johnson promised, when he returned, to look into his affairs, and to make the loan if he could conveniently do so. Lamb says: "I cannot remember any of the details of the conversation, nor the full extent given him by me as to the condition of the bank, but my impression is that I called attention to the fact that our capital had been seriously impaired by the Elkton suit, and other litigation, and that the panic had caused us to lose business and be very hard up, and the necessity of having ready money to retain our business and to recover our position. I think I asked for a loan of twenty-five thousand dollars on the building. My conversation was of such a confidential character as I would have only had with one largely interested in the bank. . . . I don't remember whether he examined the books and papers of the bank." Lamb says that the Elkton suit was one in which a bank obtained a judgment against his bank, after long and expensive litigation, for $30,000; and that the result destroyed about one-half of the capital stock of his bank, which was $100,000.

Chamberlain, who was cashier of the bank, says that Johnson visited Norfolk the latter part of November or about the 1st of December, 1873.

Hunter, who was book-keeper of the bank, and remembers Johnson being at the bank, says that he believes the reports and statements showing the condition of the bank, made up by the witness as book-keeper, were taken into the president's room while Johnson was in it, but he cannot state whether they were exhibited to Johnson.

The foregoing is all the direct evidence there is as to Johnson's knowledge of the condition of the bank at the time he returned from Norfolk. Within a very few days after his return he wrote a letter to Lamb, dated Dec. 5, 1873, saying: "I regret to say that I will be unable to comply with your wishes in letting the First National Bank have $25,000. I cannot raise the money. I was depending for the greater part of it on my folks in San Francisco, and they send me word that they cannot let me have the money, as they need all they can lay their hands on to get through the winter. The bulk of my means is in real estate and cannot readily be converted into cash. I have disposed of my stock in the First National Bank of Norfolk, and enclose certificate of my shares, with power of attorney, &c., to transfer. Please have the stock transferred to Mrs. B. Valentine, and send the certificate to her at Belleville, Essex County, New Jersey." This letter contained the certificate of stock, with the power of attorney to transfer it.

Lamb, instead of transferring the stock, wrote as follows to Cole, enclosing Johnson's letter: "I send you the enclosed to show you Mr. Johnson. Please let me know who Mrs. B. Valentine is. I shall make an assessment on our stockholders of 50 per cent. If she is not able to pay it I will not transfer the stock. Please return this letter." Cole replied: "Mrs. Valentine is the sister of Johnson, the wife of a poor man that Johnson employs on his farm. I would not transfer the stock, but notify him at once that you have made an assessment of 50 per cent."

These letters were written, Lamb says, in December, 1873. Lamb also says, that he was not satisfied from Cole's reply, but found, after obtaining legal advice, that he had no right to refuse the transfer, and therefore he made it, on Jan. 15, 1874.

On the 14th of February, 1874, Lamb wrote as follows to Johnson: "I find the enclosed certificate has not been forwarded to Mrs. Valentine, although issued a month ago; please hand it to her. I regret not hearing from you in regard to the proposition made by the directors. Something must be done at once. The bank cannot go on as affairs are now, and if I

surrender it to a receiver I know our stock will be worthless; the margin is too small. If I could have gotten the refusal of all the stock I might have induced some capitalists to come in, but I am afraid it is too late now. With $4,000 cash I could have infused new life into our stock and built it right up. Please let me hear from you, as I suppose you must feel an interest in Mrs. Valentine's stock."

Johnson did not offer himself as a witness.

2. Mrs. Valentine was called as a witness by the plaintiff. Her deceased daughter was the wife of Johnson. She herself was divorced from her husband, and he was not dead that she knew of. Johnson had no children. Her daughter died in 1864. She herself lived in California with her husband for thirteen years. She came from California in 1865 or 1866 and went to live at Mr. Johnson's house in Kearney Township, New Jersey, in 1871. She was examined as a witness in August, 1877. She endeavors to make out a consideration for the transfer of the stock to her, in this way: "Mr. Johnson owed me for services rendered after we came to live where we are. He was to pay me $1,000 a year for my services. He was away a great deal of the time, and I took care of everything while he was gone. He went away two winters to California, and I had the care and responsibility of everything — the entire place — while he was gone. . . . We have been at the place six years. He was away the second winter; then two winters intervened, and he was away another winter. . . . *Q.* Please explain why Mr. Johnson should have paid you by the assignment of the Norfolk bank stock instead of money, if he was indebted to you and wished to make payment? *A.* Because I preferred that. He would have paid money if I had wished it. I thought it would be less trouble for me in that way, already invested, and I had to pay no taxes. *Q.* Did Mr. Johnson's engagement to pay you one thousand per year for services commence at the time you moved to Kearney Township, six years ago, as you have said? *A.* It did. *Q.* Mr. Johnson has not been indebted to you, has he, for any other matter or thing, except such service for the last six years? *A.* Since my daughter's death I have had all the charge of Mr. Johnson's clothes, and of his house at

San Francisco, and here also. There was no agreement between us for compensation till we came here to Kearney. I always supposed he would compensate for these." "*Q.* What price were you to allow Mr. Johnson in payment for that stock? *A.* Fifty cents on the dollar; that was the price Mr. Lamb, the president of the bank, offered for it at the time Mr. Johnson transferred it to me." "*Q.* Did you suggest to him or he to you the purchase of this stock? *A.* I really can't tell. I think I proposed to him to take it instead of money. I am not positive. I think that was the way." "*Q.* Please explain, if you can, how you came to the knowledge that he was the owner of the Norfolk bank stock. *A.* He told me that he had the stock before he went to Norfolk to see the land that he then thought of exchanging the stock for. I think that was the first I knew of it. *Q.* And when he came back, or soon after, he proposed to you to take the stock, did he not? *A.* It was a long time after he came back; several months, I think. *Q.* Are you not mistaken in saying it was several months? *A.* It may not have been several months after; it was some time after. *Q.* Really, Mrs. Valentine, on reflection, was it more than one month? *A.* Perhaps not. I cannot remember. *Q.* When Mr. Johnson proposed that you should purchase the stock, what did he propose? Please give me, as near as you can, the language he used in relation thereto? *A.* I cannot remember the language used." "*Q.* Have you now, or had you at the time you took the assignment of this stock from Mr. Johnson, any money, or any property, to purchase the stock, other than the alleged indebtedness for annual services rendered by you to Mr. Johnson? *A.* I am not dependent entirely; I am not destitute; have enough to keep me from want. *Q.* Did you give any money or other valuable thing to Mr. Johnson for the transfer of the stock other than his alleged indebtedness to you for service? *A.* I told him at the time he might consider all my jewelry his for part compensation. *Q.* He did not accept of the jewelry, did he? *A.* Well, it remained in the house, as it always had." "*Q.* The stock that Mr. Johnson transferred to you was not paid for by either your obligation or promise of payment further than the alleged indebtedness to you, was it? *A.* It was not."

"*Q.* Had you, at that time, any other stock, bonds, bank account, or money in hand or on deposit in any bank or banks, or in any wise invested for you or for your use? *A.* I had no bank account, no stock. I am never without any money to use. I have no bonds. *Q.* The money that you had was merely pocket funds, of small amount, was it not? *A.* Yes, sir." "*Q.* In what month was the arrangement made between you and Mr. Johnson about the stock? *A.* In December, 1873. *Q.* You stated, in reply to the 32d direct question, that you thought you proposed to Mr. Johnson to take the stock instead of money. Did you mean to be understood, by any subsequent answer, that the proposition for you to take the stock arose with Mr. Johnson? *A.* No."

The Circuit Court dismissed the bill, taking, as we think, an erroneous view of Mrs. Valentine's testimony in one important particular. It was assumed that she testified that she had had charge of Johnson's house and family since the death of Mrs. Johnson, in 1864, at the fixed compensation of $1,000 per year; that is, that the compensation was for taking charge of Johnson's house and family from 1864 until the stock was transferred in 1873, and that the compensation of $1,000 a year was fixed in 1864. Whereas, what Mrs. Valentine says expressly is, that the engagement to pay her $1,000 a year for her services commenced in 1871, when she moved to Kearney Township, and not till then; and that what Johnson owed her for was for services rendered after that. The winters Johnson was away were the winters of 1872 and 1875. At most, according to her own story, less than three years' services, at $1,000 a year, had been rendered by her when she took this stock at $6,500. No alleged indebtedness accruing subsequently to this transfer of the stock in December, 1873, can be looked at. She says she supposed Johnson would compensate her for what she had done before she went to Kearney in 1871, but she does not pretend that there was any such obligation recognized by Johnson, or any debt for the same. That she, knowing that the alleged indebtedness to her did not amount to the alleged price of the stock, was conscious that the transaction was not an honest one, is shown by her admission that the stock was not paid for by her to Johnson, by either her obli-

gation or promise of payment, further than the alleged indebtedness to her. This was less than $3,000 in December, 1873. To make up the difference between the indebtedness and the $6,500, she resorts to the bald suggestion that she told Johnson at the time that he might consider all her jewelry as his, "for part compensation" for the transfer of the stock, the jewelry remaining in the house as it always had. Equally bald is the suggestion that she was saving trouble in making an investment in a stock that was worth only fifty cents on the dollar.

The conclusion of the Circuit Court was that there was no bad faith or fraud in the transfer. But what are the facts proved? Johnson, being a stockholder, goes to Norfolk and has interviews with the officers of the bank in regard to making a loan of $25,000 to the bank. He is appealed to as a stockholder to make the loan. His position as a stockholder involved not merely the value of his stock, but his liability for $13,000 more. The urgency of the needs of the bank is pressed upon him. The facts that the capital of the bank had been impaired, and that it had lost business, are brought to his attention. The bank had made a dividend in July, 1870, and one in February, 1873, and none since. Can it be doubted, from the foregoing testimony and Johnson's subsequent action, that he examined into the affairs of the bank sufficiently to satisfy himself that the failure of the bank, and the loss of its entire capital stock, and the attaching of the statutory liability of the stockholders, were impending in the near future? He was at Norfolk the last of November or the first part of December. Mrs. Valentine says that the arrangement between her and him about the stock was made in December. He sends the certificate and the power to Lamb on the 5th of December. He loses no time in assigning his stock. Lamb understood what Johnson was doing. He sent to Cole the letter from Johnson, and directed Cole to inquire as to Mrs. Valentine's responsibility. He received information that she had none, and that she was Johnson's sister. With that knowledge he acted as Johnson's attorney in transferring the stock. He evidently thought there was no *bona fides* in the transfer, for, in his letter sending the certificate to Johnson, although Johnson

had instructed him to send it to Mrs. Valentine at a given address, he addresses Johnson as if he were still a stockholder. He refers to the future and to the necessity of doing something at once, and to the prospective worthlessness of the stock, and winds up with the sarcastic remark that he supposes Johnson must feel an interest in Mrs. Valentine's stock. Mrs. Valentine was wholly unable to respond for any liability as a stockholder. This was known to her and to Johnson. Johnson, notwithstanding all the testimony on the part of the plaintiff, is not sworn as a witness for himself. It is worthy of note, that the answer does not set forth what the consideration was for the transfer to Mrs. Valentine. The bill alleges that there was no legal consideration. The answer merely avers that the transfer was not without legal consideration, and that it was made in good faith and for a valuable and lawful consideration. It is manifest that, at the very best, on Mrs. Valentine's evidence, supposing it to be entitled to credit, and on her statement of the price at which she took the stock, there was only $2,500 of consideration, at the rate of $1,000 a year for two years and a half, leaving the transfer as to eighty shares of the stock without consideration. The entire theory of the defence is that there was a sale, and not that there was any gift.

The provisions of sect. 12 of the act of June 3, 1864, c. 106, which govern the present case, are as follows: "The capital stock of any association formed under this act shall be divided into shares of one hundred dollars each, and be deemed personal property and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association; and every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares, and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired. The shareholders of each association formed under the provisions of this act, and of each existing bank or banking association that may accept the provisions of this act, shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the

amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." The answer sets forth that Johnson became the purchaser and owner of the one hundred and thirty shares in 1869. As such shareholder, he became subject to the individual liability prescribed by the statute. This liability attached to him until, without fraud as against the creditors of the bank, for whose protection the liability was imposed, he should relieve himself from it. He could do so by a *bona fide* transfer of the stock. But where the transferrer, possessed of information showing that there is good ground to apprehend the failure of the bank, colludes and combines, as in this case, with an irresponsible transferee, with the design of substituting the latter in his place, and of thus leaving no one with any ability to respond for the individual liability imposed by the statute, in respect of the shares of stock transferred, the transaction will be decreed to be a fraud on the creditors, and he will be held to the same liability to the creditors as before the transfer. He will be still regarded as a shareholder *quoad* the creditors, although he may be able to show that there was a full or a partial consideration for the transfer, as between him and the transferee.

The appellees contend that the statute does not admit of such a rule, because it declares that every person becoming a shareholder by transfer succeeds to all the liabilities of the prior holder, and that, therefore, the liabilities of the prior holder, as a stockholder, are extinguished by the transfer. But it was held by this court in *National Bank* v. *Case*, 99 U. S. 628, that a transfer on the books of the bank is not in all cases enough to extinguish liability. The court, in that case, defined as one limit of the right to transfer, that the transfer must be out and out, or one really transferring the ownership as between the parties to it. But there is nothing in the statute excluding, as another limit, that the transfer must not be to a person known to be irresponsible, and collusively made, with the intent of escaping liability, and defeating the rights given by statute to creditors. Mrs. Valentine might be liable as a shareholder succeeding to the liabilities of Johnson, because she has voluntarily assumed that position; but that is no reason why Johnson should not, at the election of creditors, still be treated as a

shareholder, he having, to escape liability, perpetrated a fraud on the statute. This is the view enforced by the decision of the Chief Justice in *Davis* v. *Stevens*, 17 Blatchf. 259.

It is urged that, as the bill prays that Johnson may answer its allegations on oath, the answer is evidence in his favor, and is to be taken as true, unless it is overcome by the testimony of one witness and by corroborating circumstances equivalent to the testimony of another witness. Under the view we have taken of the case, the only material questions which are controverted are the knowledge and intent of Johnson, and the insolvency of Mrs. Valentine, and the knowledge of the latter fact by Johnson at the time. Although Johnson executed the transfer and power of attorney on December 5, he did not deliver it to Mrs. Valentine. He sent it to Lamb for him to act as attorney. Mrs. Valentine had no agency in it. When the transfer had been made on the books of the bank, and the new certificate was made out, it was sent to Johnson on February 14, for him to deliver it to Mrs. Valentine. The letter of that date from Lamb to Johnson, which enclosed it, was full notice to Johnson that the condition of the bank was growing worse. His contract with Mrs. Valentine, if there was one, was not fully consummated on his part till after that. There was no delivery of anything by him to her till after that. On the whole evidence, the intent of Johnson, though denied in the answer, is abundantly proved, because the facts from which the conclusion as to such intent flows are satisfactorily established, to an extent sufficient to satisfy the rule of equity. As to Mrs. Valentine's insolvency, she herself proves it conclusively, and she states facts which show that Johnson must have known it. She could give him nothing, according to her story, to answer for the $4,000 balance due him on the stock, and was reduced to telling him he might consider her jewelry his, for part compensation. Under all these circumstances, the omission of Johnson to testify as a witness for himself, in reply to the evidence against him, is of great weight. This case, on the whole, is brought within the principle asserted by Mr. Chief Justice Marshall, speaking for this court, in *Clark's Executors* v. *Van Riemsdyk*, 9 Cranch, 153, as a case where the evidence arising from circumstances is stronger than the testimony of

any single witness. Greenleaf states, as a rule, that the sufficient evidence to outweigh the force of an answer may consist of one witness, with additional and corroborative circumstances, which circumstances may sometimes be found in the answer itself; or it may consist of circumstances alone, which, in the absence of a positive witness, may be sufficient to outweigh the answer even of a defendant who answers on his own knowledge. Greenleaf on Evidence, vol. iii. sect. 289.

It is contended for the appellees, that this is not a case of equitable cognizance, because a plain, adequate, and complete remedy may be had at law. But the case is one of a transfer of the legal title to the stock, made to defraud the creditors of the bank. The evidence of title to the stock is the formal assignment on the books of the bank. This being a bill for discovery as well as relief, and the fraudulent transfer being good between the parties, and only voidable at the election of the plaintiff, it is clear that equity has jurisdiction to set it aside and enforce the liability of the transferrer.

Objection is taken here, by the appellees, to the sufficiency of the proof that the Comptroller of the Currency decided, before this suit was brought, that it was necessary to enforce the personal liability of the stockholders. The plaintiff, as a witness, testified that he received written instructions from the Comptroller of the Currency to enforce the whole of the personal liability of the stockholders. The defendant Johnson objected that the written evidence referred to must be produced. The record states that the plaintiff reserved the right to file the paper, or a duly certified copy of it, with the deposition, before the same should be closed. Before the deposition was closed the witness was recalled, and produced, as the record states, the original letter, addressed to him and signed by the Comptroller, and it was filed with the deposition. No objection was made to it, and no requirement of further proof was made. It directs the receiver to institute legal proceedings to enforce against every stockholder of the bank owning stock at the time the bank suspended, his or her personal liability, as such stockholder, under the statute. This was sufficient.

The liability of the defendant bears interest from the date of said letter, Aug. 13, 1875. *Casey* v. *Galli*, 94 U. S. 673.

In June, 1878, Orson Adams was appointed receiver of the bank, in place of Bowden, the plaintiff. The decree of the Circuit Court was not made till January, 1879. The appeal to this court was taken in the name of Bowden, Adams not having been substituted as plaintiff. Adams became surety in the appeal bond, and thus treated the decree as valid and adopted the appeal. Adams now moves to be substituted as plaintiff and appellant in place of Bowden, without prejudice to the proceedings heretofore had. The appellees and their counsel first heard of the appointment of Adams from the papers served on the motion for substitution, and the appellees now move to dismiss the appeal, on the ground that none was ever lawfully taken. We think that the motion of Adams should be granted, and that of the appellees denied. Adams prosecuted the appeal in the name of Bowden, who was and is in life, and had a representative capacity. The power of amendment to this extent is authorized by sect. 954 of the Revised Statutes. It is of the same character as that exercised by this court in *Gates* v. *Goodloe*, where a writ of error was sued out by two bankrupts after their discharge in bankruptcy, and this court, on a motion to dismiss the writ, and a counter motion by the assignee in bankruptcy to be substituted as the plaintiff in error, denied the former motion and granted the latter. 101 U. S. 612.

The motion of Adams is granted, and that of the appellees denied. The decree of the Circuit Court will be reversed, with costs, and the cause remanded, with directions to that court to enter a decree in favor of the substituted plaintiff, as receiver, setting aside, as against him, the transfer of the one hundred and thirty shares of stock by Johnson to Mrs. Valentine, and decreeing that Johnson pay to said receiver the sum of $13,000, with interest thereon, at the lawful rate in the State of New Jersey, from Aug. 13, 1875, with costs. It is

So ordered.

EX PARTE WALL.

A rule was made by the Circuit Court of the United States for the Southern District of Florida, which, after reciting that it had come to the knowledge of the court that W., an attorney of the court, did, on a day specified, engage in and with an unlawful, tumultuous, and riotous gathering, he advising and encouraging thereto, take from the jail of Hillsborough County, and hang by the neck until he was dead, one John, otherwise unknown, thereby showing such an utter disregard and contempt for the law which, as a sworn attorney, he was bound to support, as shows him to be totally unfitted to occupy such position: thereupon cited him to appear at a certain time and show cause why his name should not be stricken from the roll. The attorney appeared, and answered, denying the charge in mass, and excepting to the jurisdiction of the court, (1) because there was no charge against him under oath, (2) because the offence charged was a crime by the laws of Florida for which he was liable to be indicted and convicted. The court overruled the exceptions, and called a witness who proved the charge, showing that the hanging took place before the court-house door, during a temporary recess of the court; thereupon the court made an order striking W.'s name from the roll. On motion made here for a *mandamus* to compel the judge of that court to reverse this order, and he having answered the rule, showing the special circumstances of the case, — *Held*, 1. That although not strictly regular to grant a rule to show cause why an attorney should not be struck off the roll, without an affidavit making charges against him, yet that, under the special circumstances of this case, the want of such affidavit did not render the proceeding void as *coram non judice*. 2. That the acts charged against the attorney constituted sufficient ground for striking his name from the roll. 3. That although, in ordinary cases, where an attorney commits an indictable offence, not in his character of attorney, and does not admit the charge, the courts will not strike his name from the roll until he has been regularly indicted and convicted, yet that the rule is not an inflexible one; that there may be cases in which it is proper for the court to proceed without such previous conviction; and that the present case, in view of its special circumstances, the evasive denial of the charge, the clearness of the proof, and the failure to offer any counter proof, was one in which the court might lawfully exercise its summary powers. 4. That the proceeding to strike an attorney from the roll is one within the proper jurisdiction of the court of which he is an attorney, and does not violate the constitutional provision which requires an indictment and trial by jury in criminal cases; that it is not a criminal proceeding, and not intended for punishment, but to protect the court from the official ministration of persons unfit to practise as attorneys therein. 5. That such a proceeding is not an invasion of the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law; but that the proceeding itself, when instituted in proper cases, is due process of law. 6. That, as the court below did not exceed its powers in taking cognizance of the case, no such irregularity occurred in the proceeding as to require this court to interpose by the writ of *mandamus*.

PETITION for *mandamus*.

The case is fully stated in the opinion of the court.

Mr. Charles W. Jones for the petitioner.

MR. JUSTICE BRADLEY delivered the opinion of the court.

A petition was filed in this case by J. B. Wall for an alternate writ of *mandamus* to be directed to James W. Locke, district judge of the United States for the Southern District of Florida, to show cause why a peremptory writ should not issue to compel him to vacate an order made by him as such district judge, prohibiting said Wall from practising at the bar of said court, and to restore said Wall to the rights, privileges, and immunities of an attorney and proctor thereof. The petition set forth the proceedings complained of, and an order was made by this court requiring the judge to show cause why the prayer of the petition should not be granted. The rule to show cause has been answered, and we are now called upon to decide whether the writ ought to be granted.

The proceedings of the court below for disbarring the petitioner were substantially as follows: —

On the 7th of March, 1882, during a term of the said court, held at Tampa, Hillsborough County, Florida, the same court exercising both Circuit and District Court jurisdiction, J. W. Locke, the judge then holding said court, issued, and caused to be served upon the petitioner, the following order: —

"CIRCUIT COURT OF THE U. S., SO. DISTRICT OF FLORIDA.
"MARCH TERM, 1882.

"Whereas it has come to the knowledge of this court that one J. B. Wall, an attorney of this court, did, on the sixth day of this present month, engage in and with an unlawful, tumultuous, and riotous gathering, he advising and encouraging thereto, take from the jail of Hillsborough County, and hang by the neck until he was dead, one John, otherwise unknown, thereby showing such an utter disregard and contempt for the law and its provisions, which, as a sworn attorney, he was bound to respect and support, as shows him to be totally unfitted to occupy such position:

"It is hereby ordered that said J. B. Wall be cited to appear and show cause by eleven o'clock Wednesday, the eighth instant,

why his name should not be stricken from the roll of attorneys, and he be disbarred and prohibited from practising herein.

"(Signed) JAMES W. LOCKE, *District Judge.*

"TAMPA, FLORIDA, March 7, 1882."

Wall appeared in court at the return of this rule, and, on the following day, filed a written answer, as follows: —

"This respondent, now and at all times hereafter saving and reserving to himself all and all manner of benefits of exception to the many errors, uncertainties, and imperfections in the said rule contained, prays leave to object, as if he had demurred thereto, to the right, authority, or jurisdiction of this court to issue said rule and require him to answer it:

"1st, Because said rule does not show that the matters therein charged took place in the presence of the court, or were brought to the knowledge of the court by petition or complaint in writing under oath; and,

"2d, Because respondent is charged in said rule with a high crime against the laws of Florida not cognizable in this court, and for which, if proven, this respondent is liable to indictment and prosecution before the State court; but for answer to so much of said rule as this respondent is advised that it is material or proper for him to make answer to, answering, saith —

"He denies counselling, advising, encouraging, or assisting an unlawful, tumultuous, and riotous gathering or mob in taking one John from the jail of Hillsborough County and causing his death by hanging in contempt and defiance of the law, or that he has been guilty of any unprofessional or immoral conduct which shows him to be unfitted for the position of an attorney and proctor of this court, as he is charged in the said rule.

"Whereupon he prays to be hence dismissed, &c.

"(Signed) J. B. WALL."

The court overruled the exceptions to its jurisdiction, and called to the stand Peter A. Williams, the marshal of the district, whose testimony, at the request of the respondent, was reduced to writing, and was as follows: —

"Peter A. Williams, being duly sworn to testify, says: —

"I saw Mr. J. B. Wall and others come to Mr. Craft's house about two o'clock, March 6th, and having already heard that a sheriff's posse had been summoned to protect the jail, I thought by

the orderly manner they came in that it was the sheriff's posse coming for instructions. I was sitting on the end of the piazza, and did not go in the house, but sat there till they came out, thinking they had come for instructions.

"When they came out I heard one of the party remark, 'We have got all out of you we want.' Mr. Wall was one of the party.

"I then thought something was wrong; they all went out of the gate, and Mr. Craft after them, and I followed after them rather slowly, and when I got to the corner I saw the party coming out of the jail with the criminal, the man who was afterwards hanged. They carried him over the steps to the oak tree in front of the steps to the court-house. The crowd gathered around him, and some one threw the man down. I saw him then put on a dray, and afterwards pulled up on the tree. There was a crowd of about a hundred persons there. I don't think I could name any man in that crowd except the sheriff, who was there protesting, as I had come away from the crowd and was on the upper piazza of the court-house. I heard the man hollowing. He was put on a dray with a rope around his neck. The dray went off and he fell to the ground about ten feet from a perpendicular; then the crowd pulled the rope and he went up. The crowd had their backs towards me. I suppose I could have identified some one if I had thought to, but I was excited and did not notice who they were. I saw Mr. Wall coming from the jail with the prisoner until they crossed the fence; then I did not see him any more until after it was over. I did not see him leave the crowd, though he might have done it without my seeing it. When going from the jail to the tree Mr. Wall, I think, had hold of the prisoner; he was beside him.

"I did not see him afterwards until the hanging was over, then the crowd had increased, perhaps, to 200 persons, and I went down to them to the plank-walk.

"This was Monday of this week, the 6th of this month, I think, in Tampa, Hillsboro' County.

"I also saw Mr. Sparkham, the mayor of the city, protesting at the time of the hanging."

To cross-questions he says: —

"When the man fell from the dray he fell his full length to the ground; the rope was slack."

On the next day the court, after argument by respondent's counsel, made an order in the case, "That J. B. Wall be pro-

hibited from practising at the bar of this court until a further order herein."

The answer of Judge Locke to the rule granted by this court to show cause why a *mandamus* should not issue, states: —

"That during a session of the Circuit and District Courts of the United States at Tampa, in said Southern District of Florida, he, the said James W. Locke, presiding, on the sixth day of March, A. D. 1882, at the adjournment of said courts for dinner, at about one o'clock of said day, as he was passing from the court-house, a prisoner was being brought to the jail in the same yard by two officers; that upon his return to the court-house after dinner, in a little more than an hour, the dead body of the same prisoner hung from the limb of a tree directly in front of the court-house door; whereby he became personally informed of the commission of a most serious offence against the laws. The same afternoon he was informed of the active participation in said crime of one J. B. Wall, an attorney of said court, by an eye-witness in whom the most implicit confidence could be placed, but who declined to make any charge or affidavit of such fact on account of a fear of said Wall's influence and the local feeling it would cause against him, the said witness.

"That not only from the direct statements of eye-witnesses, but from numerous other sources, reliable information of like import was received; whereupon said J. B. Wall, your petitioner, was, on the said seventh day of March, during a session of the Circuit Court of the United States, in open court, charged in writing by the respondent herein, as judge, with having, with an unlawful, tumultuous, and riotous gathering, he advising and encouraging thereto, taken from the jail of Hillsborough County, and hanged to a tree by the neck until he was dead, a man to the court known only as John; and cited by rule served upon him to show cause by eleven o'clock A. M. of the next day, the eighth day of said March, why his name should not be stricken from the roll of attorneys and he prohibited from practising in the U. S. courts of said district.

"That at said time of return, said J. B. Wall appeared in person, and by counsel, and moved that whereas said rule had charged him with a criminal offence, indictable by the grand jury of the courts of the State, the matter be continued until after the meeting of such grand jury; and the matter was held under advisement by the court and continued until next day.

"That at the opening of the court the next day, before any order had been made upon the pending motion, came said J. B. Wall,

and withdrew said motion for continuance, and filed answer demurring to the right of the court to issue the rule served upon him, because [stating the contents of Wall's answer], and demanded that proof be had of the matter charged.

"That thereupon Peter A. Williams, Esq., U. S. marshal for said district, being duly sworn, testified as follows: [stating the testimony of Williams, as before given.]

"Whereupon J. B. Wall, being himself present and stating that he had no testimony to offer, and desiring to be heard by counsel, was so heard, and the court took the matter under consideration.

"Afterwards, to wit, on the tenth day of March aforesaid, the matter having been fully and duly considered, it was ordered that J. B. Wall be prohibited from practising at the bar of Circuit or District Courts of this district until further order therein.

"All of which matters are true, and as far as relate to the action of the court therein shown and set forth in the records of said court and the papers therein.

"And, further answering, he says that J. B. Wall at no time denied active participation in the hanging as charged, nor answered the spirit and substance of said charge.

"That when the motion for continuance was withdrawn by him, and the demand made that proof be made of the charge, upon inquiry your respondent ascertained that both the sheriff and mayor, who had alone opposed the action of the mob, and the only parties present not active participants, were absent from the city, and could not be summoned to testify without unadvisable delay; of all of which said J. B. Wall had knowledge.

"That on account of the excited state of feeling existing at the time, the timidity of many, from the influential position of some of those engaged in the hanging, and the sympathy of others with the lynchers, it was not advisable to attempt to compel any resident of said city of Tampa who was found to have personal knowledge of the matter, to testify against said J. B. Wall.

"That said J. B. Wall had every opportunity to explain his presence and action in the matter as proven, if innocent, but made no attempt to do so.

"That the evidence, although of but a single witness, for grounds already stated, was to your respondent positively conclusive beyond a reasonable doubt that said J. B. Wall had been guilty of active participation in a most immoral and criminal act, and a leader in a most atrocious murder, in defiance and contempt of all law and justice, and had thereby shown himself unfitted to longer retain the

position of an attorney in any court over which your respondent might have the honor to preside.

"Wherefore and upon which showing your respondent would most humbly submit to your Honors that said order prohibiting said J. B. Wall from practising as attorney should not be revoked nor he restored to the rights and privileges of an attorney of said courts

"JAMES W. LOCKE,
"*U. S. Dis. Judge, So. Dis. Fla.*
"KEY WEST, FLA., Dec'r 2, 1882."

It will be perceived that the rule to show cause, which was served upon the petitioner, contained a definite charge of a very heinous offence, and that an opportunity was given to him to meet it and to exonerate himself if he could do so. It would, undoubtedly, have been more regular to have required the charge to be made by affidavit, and to have had a copy thereof served (with the rule) upon the petitioner. But the circumstances of the case, as shown by the return of the judge, seem to us to have been sufficient to authorize the issuing of the rule without such an affidavit. The transaction in which the petitioner was charged with participating was virtually in the presence of the court. It took place in open day, in front of the court-house, and during a temporary recess of the actual session of the court; and the awful result of the lawless demonstration was exhibited to the judge on his return to the court-room. Under the intense excitement which prevailed, it is not wonderful that no person could be found willing to make a voluntary charge against the petitioner or any one else; and yet, the fact that he was engaged as one of the perpetrators was so notorious, and was brought to the judge's knowledge by information so reliable and positive, that he justly felt it his duty to take official notice of it, and to give the petitioner an opportunity of repelling the charge. This was done in such a manner as not to deprive him of any substantial right. The charge was specific, due notice of it was given, a reasonable time was set for the hearing, and the petitioner was not required to criminate himself by answering under oath. In *Ex parte Steinman and Hensel*, 95 Pa. St. 220, where the county court on its own motion had cited the parties before it for

publishing a gross libel upon the court, and had struck their names from the roll, though, on appeal, the order was reversed on other grounds, as to the mode of initiating the proceedings, Chief Justice Sharswood, delivering the opinion of the court, said: "We entertain no doubt that a court has jurisdiction without any formal complaint or petition, upon its own motion, to strike the name of an attorney from the roll in a proper case, provided he has had reasonable notice, and been afforded an opportunity to be heard in his defence." In the case of *Randall* v. *Brigham*, 7 Wall. 523, 539, which was an action for damages brought by an attorney against a judge for striking his name from the roll unjustly and without authority, not having before him in making the order to show cause any charge of misconduct, except only a letter of a third person addressed to the grand jury; this court, speaking by Mr. Justice Field, said: "But the claim of the plaintiff is not correct. The information imparted by the letter was sufficient to put in motion the authority of the court, and the notice to the plaintiff was sufficient to bring him before it to explain the transaction to which the letter referred. The informality of the notice, or of the complaint by letter, did not touch the question of jurisdiction. The plaintiff understood from them the nature of the charge against him; and it is not pretended that the investigation which followed was not conducted with entire fairness. He was afforded ample opportunity to explain the transaction and vindicate his conduct."

Looking at all the circumstances of the present case, we are not prepared to say that the course which was pursued rendered the proceedings void, as being *coram non judice*. And since they were not void (though not strictly regular), and since no substantial right of the petitioner was invaded, we do not think that the mere form of the proceeding requires us to interpose by the extraordinary remedy of *mandamus*.

The next question to be considered is, whether the facts charged against the petitioner constitute a legitimate ground for striking his name from the roll. Of this we think there can be no doubt. It is not contended but that, if properly proven, the facts charged are good cause for removal from the bar. A moment's consideration will be sufficient to demonstrate this.

It is laid down in all the books in which the subject is treated, that a court has power to exercise a summary jurisdiction over its attorneys to compel them to act honestly towards their clients, and to punish them by fine and imprisonment for misconduct and contempts, and, in gross cases of misconduct, to strike their names from the roll. If regularly convicted of a felony, an attorney will be struck off the roll as of course, whatever the felony may be, because he is rendered infamous. If convicted of a misdemeanor which imports fraud or dishonesty, the same course will be taken. He will also be struck off the roll for gross malpractice or dishonesty in his profession, or for conduct gravely affecting his professional character. In Archbold's Practice, edition by Chitty, p. 148, it is said: "The court will, in general, interfere in this summary way to strike an attorney off the roll, or otherwise punish him, for gross misconduct, not only in cases where the misconduct has arisen in the course of a suit, or other regular and ordinary business of an attorney, but where it has arisen in any other matter so connected with his professional character as to afford a fair presumption that he was employed in or intrusted with it in consequence of that character." And it is laid down by Tidd that "where an attorney has been fraudulently admitted, or convicted (after admission) of felony, or other offence which renders him unfit to be continued an attorney, or has knowingly suffered his name to be made use of by an unqualified person, or acted as agent for such person, or has signed a fictitious name to a demurrer, as and for the signature of a barrister, or otherwise grossly misbehaved himself, the court will order him to be struck off the roll." 1 Tidd's Practice, 89, ed. 9. Where an attorney was convicted of theft, and the crime was condoned by burning in the hand, he was nevertheless struck from the roll. "The question is," said Lord Mansfield, "whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion. . . . It is not by way of punishment; but the court in such cases exercise their discretion, whether a man whom they have formerly admitted is a proper person to be continued on the roll or not."

Now, what is the offence with which the petitioner stands

charged? It is not a mere crime against the law; it is much more than that. It is the prostration of all law and government; a defiance of the laws; a resort to the methods of vengeance of those who recognize no law, no society, no government. Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, to trample them under foot, and to ignore the very bands of society, argues recreancy to his position and office, and sets a pernicious example to the insubordinate and dangerous elements of the body politic. It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve. Whatever excuse may ever exist for the execution of lynch law in savage or sparsely settled districts, in order to oppose the ruffian elements which the ordinary administration of law is powerless to control, it certainly has no excuse in a community where the laws are duly and regularly administered.

But besides the character of the act itself, as denoting a gross want of fealty to the law and repudiation of legal government, the particular circumstances of place and time invest it with additional aggravations. The United States court was in session; this enormity was perpetrated at its door; the victim was hanged on a tree, with audacious effrontery, in the virtual presence of the court! No respect for the dignity of the government as represented by its judicial department was even affected; the judge of the court, in passing in and out of the place of justice, was insulted by the sight of the dangling corpse. What sentiments ought such a spectacle to arouse in the breast of any upright judge, when informed that one of the officers of his own court was a leader in the perpetration of such an outrage?

We have no hesitation as to the character of the act being sufficient to authorize the action of the court.

A question of greater difficulty is raised as to the legality of proceeding in a summary way on a charge of this nature. It is strenuously contended that when a crime is charged against an attorney for which he may be indicted, and the truth of the charge is denied or not admitted by him, it cannot be made the

ground of an application to strike his name from the roll until he has been regularly convicted by a jury in a criminal proceeding; or, at least, that this is true, when the act charged was not committed in his professional character.

As, in urging this argument, much stress is laid upon the fact that the petitioner, by his answer, denied the charge contained in the rule to show cause, it is proper to notice the manner in which this denial was made. The charge, as we have seen, was specific and particular: "That J. B. Wall, an attorney of this court, did, on the sixth day of this present month, engage in and with an unlawful, tumultuous, and riotous gathering, he advising and encouraging thereto, take from the jail of Hillsborough County and hang by the neck until he was dead, one John, otherwise unknown, thereby showing an utter disregard and contempt for the law and its provisions," &c. The denial of this charge was a mere negative pregnant, amounting only to a denial of the attending circumstances and legal consequences ascribed to the act. The respondent denied "counselling, advising, encouraging, or assisting an unlawful, tumultuous, and riotous gathering or mob in taking one John from the jail of Hillsborough County and causing his death by hanging, in contempt and defiance of the law." He was not required to answer under oath, and did not do so. Yet, free from this restriction, he did not come out fully and fairly and deny that he was engaged in the transaction at all; but only that he did not engage in it with the attendant circumstances and legal consequences set out in the charge. Even the name of the victim is made a material part of the traverse.

Upon such a special plea as this, we think the court was justified in regarding the denial as unsatisfactory. It was really equivalent to an admission of the substantial matter of the charge.

Nevertheless, the marshal of the court was called as a witness, and clearly proved the truth of the charge; and no evidence was offered in rebuttal. The case, as it stood before the court, was as clear of all doubt as if the petitioner had expressly admitted his participation in the transaction.

It is necessary, however, that we should examine the authorities on the question raised by the petitioner, as to the

power of the court to proceed against him without a previous conviction upon an indictment.

It has undoubtedly been held in some of the cases that where the offence is indictable, and the facts are not admitted, a regular conviction must be had before the court will exercise its summary jurisdiction to strike the name of the party off the roll. At first view this was supposed to be the purport of Lord Denman's judgment in the anonymous case reported in 5 Barn. & Adol. 1088. That was a case of professional misconduct in pecuniary transactions. Lord Denman is reported as saying: "The facts stated amount to an indictable offence. Is it not more satisfactory that the case should go to a trial? I have known applications of this kind after conviction, upon charges involving professional misconduct; but we should be cautious of putting parties in a situation where, by answering, they might furnish a case against themselves, on an indictment to be afterwards preferred. On an application calling upon an attorney to answer the matters of an affidavit, it is not usual to grant the rule if an indictable offence is charged." And the Solicitor-General, Sir John Campbell, who made the application in that case, being requested to look at the authorities, afterwards stated that he could find no precedent for it. In that case, however, the rule applied for was one requiring the attorney to answer charges on oath. On a similar application in a subsequent case charging perjury and fraud, *In re* ——, 3 Nev. & Perry, 889, Lord Denman said: "Would not an indictment for perjury lie upon these facts? We are not in the habit of interfering in such a case, unless there is something amounting to an admission on the part of the attorney, which would render the intervention of a jury unnecessary."

In another case in the Exchequer, *Ex parte* ——, 2 Dowl. P. C. 110, where an attorney had been sued in an action at law for an aggravated libel, and a verdict had been rendered against him with only one shilling damages; on an application being then made to strike him off the roll, Lord Lyndhurst said: "Have you any instance of such an application on a verdict for the same criminal act, but for which no criminal proceedings have been taken?" and intimated that if there was any such case, the rule would be granted, but added: "Here there was

conflicting evidence at the trial, and it is doubtful whether the publication was brought home to the defendant; and the jury seemed to have so considered it: " and the rule was refused.

But this matter was carefully reviewed by the Court of Exchequer in the subsequent case of *Stephens* v. *Hill*, 10 Mee. & W. 28, where motion was made against an attorney who had conspired with others to induce a witness for the opposite party to absent himself from a trial, giving him money, &c. It was objected that the application to strike from the roll could not be heard on these charges without a conviction, inasmuch as a conspiracy is an indictable offence. Lord Abinger took a distinction between a rule to show cause why an attorney should not be struck off the roll, and a rule calling on him to answer the matters of an affidavit with a view to strike him off the roll. The latter course he conceded would be improper, if the offence was indictable, because it would compel the attorney to criminate himself; but not so the former, for he might clear himself without answering under oath; and that this was all that Lord Denman meant in the case before him. Lord Abinger said that as long as he had known Westminster Hall, he had never heard of such a rule as that an attorney might not be struck off the roll for misconduct in a cause merely because the offence imputed to him was of such a nature that he might have been indicted for it; but he said that in the case of applications calling upon an attorney to answer the matters of an affidavit, he had known Lord Kenyon and Lord Ellenborough frequently say, You cannot have a rule for this purpose, because the misconduct you impute to the man is indictable; but you may have one to strike him off the roll. After noticing and explaining the language attributed to Lord Denman, as before stated, Lord Abinger adds: " If, indeed, a case should occur where an attorney has been guilty of some professional misconduct for which the court by its summary jurisdiction might compel him to do justice, and at the same time has been guilty of something indictable in itself, but not arising out of the cause, the court will not inquire into that with a view of striking him off the roll, but would leave the party aggrieved to his remedy by a criminal prosecution."

This expression, about leaving the party aggrieved to his

remedy by a criminal prosecution, is frequently found in the English cases, and has reference to the practice in that country of regarding the party injured by the perpetration of a crime as the proper person to prosecute the offender; and one, indeed, upon whom a duty, in some sort, rested to institute such prosecution. The court would, therefore, hesitate to take any summary action against the offender which might remove the inducements the injured party would otherwise have for proceeding criminally against him, and thus interfere with the course of justice. In this country, the prosecution of criminal offences is generally committed to the charge of a public officer, and sufficient emolument is attached to the duty of prosecution to secure its faithful performance. The same reason, therefore, does not exist here, as in England, for leaving it to the injured party to prosecute for the criminal offence. So far as the offender himself is concerned, it is true, the reason is equally strong against compelling him to answer under oath charges preferred against him, and in favor of giving him a trial by jury in all cases of doubt or of conflicting evidence. That a reluctance to interfere with the incentive to prosecute criminally in these cases operated strongly upon the judicial mind in England, is manifest from the fact, that after a prosecution had been made, and the duty of the injured party had been performed, the courts never hesitated to strike the accused from the roll, if found guilty by a jury, even though judgment against him had been arrested, or reversed, or the offence had been pardoned or condoned, *Rex* v. *Southerton*, 6 East, 126; *In the Matter of King*, 8 Q. B. 129; *In re Garbett*, 18 C. B. 403; thus showing that it is not a technical conviction which is required, but a fair effort on the part of the prosecutor to bring the offender to justice; coupled also with the fact that a jury is the most suitable tribunal for passing upon a question of fact depending upon conflicting evidence.

Some expressions in the cases cited, including the remarks made by Lord Abinger in *Stephens* v. *Hill*, seem to imply that the summary jurisdiction will not be exercised where the charges made against an attorney affect only his general character as such, and do not amount to malpractice in a particular cause. But subsequent decisions are to the effect that it is

properly extended to cases affecting his general character also. Thus, in *Re Blake*, 3 El. & El. 34, an attorney was struck from the roll for having improperly collected the money due on a mortgage which he had pledged as collateral security for a loan, and which he borrowed from the pledgee on some false pretence. On a rule to show cause and reference to the master, the facts were found to be truly charged; and although he was not acting as attorney in the matter, the court suspended his certificate for two years, on the general ground, as stated by Lord Chief Justice Cockburn, that where an attorney is shown to have been guilty of gross fraud, although not such as to render him liable to an indictment, nor committed by him while the relation of attorney and client was subsisting between him and the person defrauded, or in his character as an attorney, the court will not allow suitors to be exposed to gross fraud and dishonesty at the hands of one of its officers. And in a subsequent case, *Re Hill*, Law Rep. 3 Q. B. 543, where an attorney acting, not as such, but as clerk to a firm of attorneys, appropriated to his own use money which came to his hands on the sale of an estate; on a motion to strike his name from the roll, it was objected that, as his offence was indictable, a conviction was necessary before this proceeding could be had. Lord Chief Justice Cockburn said: "No case has, so far as I am aware, come before the court under the precise circumstances under which this case presents itself, namely, of an act of delinquency committed by an attorney's clerk, who at the same time is an attorney, though at that time not acting as such; but still I think, on every principle of justice, we ought not the less to entertain the application. . . . If the delinquent had been proceeded against criminally upon the facts admitted by him, it is plain that he would have been convicted of embezzlement; and, upon that conviction being brought before us, we should have been bound to act. If there had been a conflict of evidence upon the affidavits, that might be a very sufficient reason why the court should not interfere until the conviction had taken place; but here we have the person against whom the application is made admitting the facts." Mr. Justice Blackburn, in the same case, said: "I think when we are called upon, in the exercise of our equitable

jurisdiction, to order an attorney to perform a contract, to pay money, or to fulfil an undertaking, there we have jurisdiction only if the undertaking or the contract is made in his character of attorney, or so connected with his character of attorney as to bring it within the power of the court to require that their officer should behave well as an officer. But where there is a matter which would subject the person in question to a criminal proceeding, in my opinion, a different principle must be applied. We are to see that the officers of the court are proper persons to be trusted by the court with regard to the interests of suitors, and we are to look to the character and position of the persons, and judge of the acts committed by them, upon the same principle as if we were considering whether or not a person is fit to become an attorney. . . . It should be considered whether the particular wrong done is connected with the character of an attorney. The offence morally may not be greater, but still, if done in the character of an attorney, it is more dangerous to suitors, and should be more severely marked. I agree that where it is denied that a criminal offence has been committed, the court ought not to decide on affidavits a question which ought to be tried before a jury."

This case is important as showing the latest consideration of the question by the English courts, and by the most eminent judges of those courts.

The rule to be deduced from all the English authorities seems to be this: that an attorney will be struck off the roll if convicted of felony, or if convicted of a misdemeanor involving want of integrity, even though the judgment be arrested or reversed for error; and also (without a previous conviction) if he is guilty of gross misconduct in his profession, or of acts which, though not done in his professional capacity, gravely affect his character as an attorney: but in the latter case, if the acts charged are indictable, and are fairly denied, the court will not proceed against him until he has been convicted by a jury; and will in no case compel him to answer under oath to a charge for which he may be indicted.

This rule has, in the main, been adopted by the courts of this country; though special proceedings are provided for by

statute in some of the States, requiring a formal information under oath to be filed, with regular proceedings and a trial by jury. The cases are quite numerous in which attorneys, for malpractice or other misconduct in their official character, and for other acts which showed them to be unfit persons to practise as attorneys, have been struck from the roll upon a summary proceeding without any previous conviction of a criminal charge. See, amongst others, the case of *Niven*, 1 Wheeler, Crim. Cas. 337, note; *Ex parte Burr*, id. 503; s. c. 2 Cranch C. C. 379; *In the Matter of Peterson*, 3 Paige (N. Y.), 510; *Ex parte Brown*, 1 How. (Miss.) 303; *In the Matter of Mills*, 1 Mich. 392; *Ex parte Secombe*, 19 How. 9; *In re John Percy*, 36 N. Y. 651; *Dickens's Case*, 67 Pa. St. 169; *In re Hirst and Ingersoll*, 9 Phil. (Pa.) 216; *Baker* v. *Commonwealth*, 10 Bush (Ky.), 592; *Penobscot Bar* v. *Kimball*, 64 Me. 140; *Matter of George W. Wool*, 36 Mich. 299; *People* v. *Goodrich*, 79 Ill. 148; *Delano's Case*, 58 N. H. 5; *Ex parte Walls*, 64 Ind. 461; *In the Matter of Eldridge*, 82 N. Y. 161.

But where the acts charged against an attorney are not done in his official character, and are indictable, and not confessed, there has been a diversity of practice on the subject: in some cases it being laid down that there must be a regular indictment and conviction before the court will proceed to strike him from the roll; in others, such previous conviction being deemed unnecessary.

The former view is taken, or seems to be assumed, in the cases we will now cite.

In an anonymous case, reported in 2 Halst. (N. J.) 162 (1824), where the charge was larceny, the court refused the rule to strike off the roll, because the offence was indictable, and there had been no conviction.

In *The State* v. *Foreman*, 3 Mo. 412, the court refused to disbar an attorney for passing counterfeit money, knowing it to be counterfeit, and escaping from prison before being convicted therefor; the ground of refusal being that it was not a case within the Missouri statute, which required a conviction. Of course, being governed by the statute, this case is not in point.

In *Ex parte Fisher*, 6 Leigh (Va.), 619 (1835), Fisher commented to a jury in a manner which the judge deemed grossly

unprofessional and disrespectful to the court; and on the next day, after reciting the circumstances, made an order suspending his license for twelve months. This order was reversed by the Court of Appeals, on the ground that the party proceeded against must be regularly prosecuted by indictment or information, and found guilty by a jury. But as this decision was based upon a statute of Virginia, prescribing the course of proceeding, it is no authority on the point in question.

In *The State* v. *Chapman*, 11 Ohio, 430, an attorney had been charged with theft, and brought an action of slander therefor; the defendant pleaded the truth in justification, and obtained a verdict establishing his defence. Upon this, a rule was granted against the attorney to show cause why he should not be struck off the roll. He proved explanatory circumstances; and the court held that the verdict in the civil action was not sufficient to establish the charge of larceny, and discharged the rule.

In *Beene* v. *The State*, 22 Ark. 149, where the defendant had made an unwarrantable and atrocious personal attack upon the circuit judge for his action as judge; on application of the county bar to strike his name from the roll, the rule was granted; but the Supreme Court of Arkansas reversed the order, on the ground that the proceedings were irregular, and not in pursuance of the statute, which required regular charges to be exhibited, verified by affidavit, and a time fixed for hearing. The court also held that where the offence is indictable, there must be a regular conviction before the party can be struck off the roll; if not indictable, he was entitled to be tried by a jury. This case seems to have been decided upon the statutes of Arkansas.

In *Ex parte Steinman and Hensel*, 95 Pa. St. 220, the respondents published a libel against the judges of the Quarter Sessions of Lancaster County, Pennsylvania, accusing them of political motives in allowing a defendant to be acquitted. On being cited to show cause why they should not be struck off the roll, they took the ground, amongst other things, that they were charged with an indictable offence, and were entitled to a trial by jury. The court having made the rule absolute, they appealed, and the Supreme Court of Pennsylvania reversed the order. Chief Justice Sharswood, in delivering the opinion of

the court, said: "No question can be made of the power of a court to strike a member of the bar from the roll for official misconduct. . . . We do not mean to say that there may not be cases of misconduct not strictly professional, which would clearly show a person not to be fit to be an attorney, nor fit to associate with honest men. Thus, if he was proved to be a thief, a forger, a perjurer, or guilty of other offences of the *crimen falsi*. But no one, we suppose, will contend that for such an offence he can be summarily convicted and disbarred by the court without a formal indictment, trial, and conviction by a jury, or upon confession in open court." Reference was then made to a provision in the Bill of Rights of the Pennsylvania Constitution of 1874, that "no conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers, &c., where the fact that such publication was not maliciously or negligently made, shall be established to the satisfaction of the jury;" and it was held that this provision, at all events, entitled the parties to a jury trial.

The cases now cited do undoubtedly hold, that where the offence charged is indictable and is committed outside of the attorney's professional employment or character, and is denied by him, a conviction by a jury should be had before the court will take action for striking his name from the roll.

There are other cases, however, in which it is held that a previous conviction is not necessary.

In *Ex parte Burr*, 1 Wheeler, Criminal Cases, 503, s. c. 2 Cranch C. C. 379, the Circuit Court of the District of Columbia struck Burr off the roll on charges made by Mr. Key, of various instances of malpractice, and also of dishonest conduct, in procuring deeds of property from persons in distress, &c. Burr objected, amongst other things, that he was entitled to a trial by jury. The court examined witnesses, who were cross-examined by the defendant, and Chief Justice Cranch delivered an elaborate opinion, concluding by making the rule absolute for disbarring the accused, holding that proceedings by attachment, as for contempt and to purify the bar of unworthy members, are not within those provisions of the Constitution which guarantee a trial by jury. This case was brought

to the attention of this court on an application for a *mandamus* to compel the Circuit Court to restore Burr to the bar, and the writ was refused. The court, by Chief Justice Marshall, expressed a disinclination to interpose unless the conduct of the court below was irregular or flagrantly improper; as where it had exceeded its power or decided erroneously on the testimony; and upon the testimony, it would be unwilling to interpose where any doubt existed.

Fields v. *The State*, Mart. & Y. (Tenn.) 168, was the case of a constable (but placed upon the same ground as that of attorneys), and the charge was, extortion. The Supreme Court of Tennessee, by Catron, J., held that a previous conviction was not necessary to enable the court below to suspend from office; that the constitutional privilege of trial by jury for crime does not apply to prevent courts from punishing its officers for contempt, and to regulate them or remove them in particular cases; that removal from office for an indictable offence is no bar to an indictment; that it is a proceeding in its nature civil, and collateral to any criminal prosecution by indictment; and that, even if acquitted by a jury, the party could be removed if the court discovered from the facts proved on the trial that he was guilty of corrupt practices.

In the subsequent case of *Smith* v. *The State*, 1 Yerg. (Tenn.) 228, the charge was that the attorney had accepted a challenge in Tennessee to fight a duel, and had fought with and killed his antagonist in Kentucky, where an indictment had been found against him. He demurred to the charge, and judgment was given against him on the demurrer, that his name be struck from the roll. The Supreme Court of Tennessee held the charge to be sufficient; but that, instead of receiving a demurrer, the Circuit Court should have proceeded to take the proofs to ascertain the truth of the charge. The court, by Catron, J., said: "The principle is almost universal in all governments, that the power which confers an office has also the right to remove the officer for good cause; the county court; constables, &c.; the senate; officers elected by the legislature and people; in all these cases the tribunal removing is of necessity the judge of the law and fact; to ascertain which,

every species of evidence can be heard, legal in its character, according to common-law rules, and consistent with our Constitution and laws. This court, the Circuit Court, or the county court, on a motion to strike an attorney from the rolls, has the same right, growing out of a similar necessity, to examine evidence of the facts, that the senate of the State has when trying an impeachment. . . . The attorney may answer the charges in writing if he chooses, when evidence will be heard to support or to resist them; or, if he does not answer, still the charges must be proved, or confessed by the defendant, before he can be stricken out of the roll." The cause was thereupon remanded to the Circuit Court, to hear the proofs; and it was declared that if the facts were proved as charged, it would be amply sufficient to authorize that court to strike the defendant from the roll, even though there had been no law in Tennessee for the suppression of duelling.

Here, it will be observed, there was no conviction; nothing but an indictment found in another State; and yet the Supreme Court of Tennessee held that the court below might lawfully proceed with the case.

In *Perry* v. *The State*, 3 Greene (Iowa), 550, there were charges of misconduct as an attorney, and of perjury. The charge was dismissed for want of certainty; but as to the charge of false swearing, which it was contended could not be set up without a previous conviction, the court said that a conviction was not necessary.

In re John Percy, 36 N. Y. 651, an attorney was struck off the roll on the ground that his general reputation was bad, that he had been several times indicted for perjury, one or two of the indictments being still pending, and that he was a common mover and maintainer of suits on slight and frivolous pretexts. The order was affirmed on appeal. Some of the offences charged in this case were of an indictable character, and one point raised on the appeal was, that the court has no right to call upon an attorney to answer such charges, because it compels him to give evidence against himself. But to this the court answered that he is not compelled to be sworn, but may introduce evidence tending to show his innocence.

In *Penobscot Bar* v. *Kimball*, 64 Me. 140, an attorney was

accused of misconduct, both in his professional character and otherwise, obtaining money by false pretences, and the like. He had also, many years before, been convicted of forgery of a deposition used in court, but had been pardoned. It was held that he was an unfit person to be an attorney, and he was struck from the roll. In this case indictable offences of which the party had not been regularly convicted were embraced in the charges against him.

In *Delano's Case*, 58 N. H. 5, an attorney, being collector of taxes for the town, appropriated the money to his own use, intending to return it; but failing to do so, he was struck from the roll. The offence in this case was clearly of an indictable character, and no conviction had been obtained against him in a criminal proceeding.

In *Matter of George W. Wool*, 36 Mich. 299, a bill in equity having been filed against an attorney charging him with procuring a deed to himself by forgery or substitution of a paper, and a decree having been made against him, the court entered an order to show cause why he should not be struck from the roll, allowing him to present affidavits in exculpation; but no sufficient cause being shown against the rule, it was made absolute. Here was an indictable offence, and no previous conviction; yet the court, upon the evidence it had before it, struck the party's name from the roll.

In *Ex parte Walls*, 64 Ind. 461, the charge was of forging an affidavit to obtain a change of venue in a cause pending in the court. Special proceedings were had under the statute of Indiana, and the party was struck off the roll. On error brought, it was objected that he should have been first regularly convicted of the crime by a prosecution on the part of the state. The court held that this is only true when the object is to inflict punishment, but not when it is to disbar the party, any more than when forgery is proved as a defence in a civil suit; that whilst a conviction would have authorized a disbarment, the proceeding to disbar might precede the criminal prosecution. This case, it is true, was for malpractice as an attorney, and, therefore, may not be strictly in point; but the ground taken by the court was general, and applicable to all cases for which an attorney may be disbarred.

In the recent case of *People* v. *Appleton*, 15 Chicago Legal News, 241, where the charge against an attorney was for disposing of property held by him as a trustee, and appropriating the proceeds to his own use, but was not made out to the satisfaction of the court; it was observed, however, that whilst as a general rule if an attorney is guilty of misconduct in his private character, and not in his official character as attorney, relief can only be obtained by a prosecution in a proper court, at the suit of the party injured, yet that "it is not to be held that there are no exceptions; that there are not cases in which an attorney's misconduct in his private capacity merely, may be of so gross a character that the court will exercise the power of disbarment. There is too much of authority to the contrary to say that."

From this review of the authorities in this country it is apparent, that whilst it may be the general rule that a previous conviction should be had before striking an attorney off the roll, for an indictable offence, committed by him when not acting in his character of an attorney, yet that the rule is not an inflexible one. Cases may occur in which such a requirement would result in allowing persons to practise as attorneys, who ought, on every ground of propriety and respect for the administration of the law, to be excluded from such practice. A criminal prosecution may fail by the absence of a witness, or by reason of a flaw in the indictment, or some irregularity in the proceedings; and in such cases, even in England, the proceeding to strike from the roll may be had. But other causes may operate to shield a gross offender from a conviction of crime, however clear and notorious his guilt may be, — a prevailing popular excitement; powerful influences brought to bear on the public mind, or on the mind of the jury; and many other causes which might be suggested; and yet, all the time, the offender may be so covered with guilt, perhaps glorying in it, that it would be a disgrace to the court to be obliged to receive him as one of its officers, clothed with all the prestige of its confidence and authority. It seems to us that the circumstances of the case, and not any iron rule on the subject, must determine whether, and when, it is proper to dispense with a preliminary conviction. If, as Lord Chief Justice

Cockburn said, the evidence is conflicting, and any doubt of the party's guilt exists, no court would assume to proceed summarily, but would leave the case to be determined by a jury. But where the case is clear, and the denial is evasive, there is no fixed rule of law to prevent the court from exercising its authority.

The provisions of the Constitution, which declare that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, and that the trial of all crimes, except in cases of impeachment, shall be by jury, have no relation to the subject in hand. As held by the Supreme Court of Tennessee in *Fields* v. *The State* (and the same view is expressed in other cases), the constitutional privilege of trial by jury for crimes does not apply to prevent the courts from punishing its officers for contempt, or from removing them in proper cases. Removal from office for an indictable offence is no bar to an indictment. The proceeding is in its nature civil, and collateral to any criminal prosecution by indictment. The proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practise in them. Undoubtedly, the power is one that ought always to be exercised with great caution; and ought never to be exercised except in clear cases of misconduct, which affect the standing and character of the party as an attorney. But when such a case is shown to exist, the courts ought not to hesitate, from sympathy for the individual, to protect themselves from scandal and contempt, and the public from prejudice, by removing grossly improper persons from participation in the administration of the laws. The power to do this is a rightful one; and, when exercised in proper cases, is no violation of any constitutional provision.

It is contended, indeed, that a summary proceeding against an attorney to exclude him from the practice of his profession on account of acts for which he may be indicted and tried by a jury is in violation of the Fifth Amendment of the Constitution, which forbids the depriving of any person of life, liberty, or property without due process of law. But the action of the court in cases within its jurisdiction is due process of law. It

is a regular and lawful method of proceeding, practised from time immemorial. Conceding that an attorney's calling or profession is his property, within the true sense and meaning of the Constitution, it is certain that in many cases, at least, he may be excluded from the pursuit of it by the summary action of the court of which he is an attorney. The extent of the jurisdiction is a subject of fair judicial consideration. That it embraces many cases in which the offence is indictable is established by an overwhelming weight of authority. This being so, the question whether a particular class of cases of misconduct is within its scope, cannot involve any constitutional principle.

It is a mistaken idea that due process of law requires a plenary suit and a trial by jury, in all cases where property or personal rights are involved. The important right of personal liberty is generally determined by a single judge, on a writ of *habeas corpus*, using affidavits or depositions for proofs, where facts are to be established. Assessments for damages and benefits occasioned by public improvements are usually made by commissioners in a summary way. Conflicting claims of creditors, amounting to thousands of dollars, are often settled by the courts on affidavits or depositions alone. And the courts of chancery, bankruptcy, probate, and admiralty administer immense fields of jurisdiction without trial by jury. In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts. "Perhaps no definition," says Judge Cooley, "is more often quoted than that given by Mr. Webster in the Dartmouth College case: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society.'" Cooley's Const. Lim. 353.

The question, what constitutes due process of law within the meaning of the Constitution, was much considered by this court in *Davidson* v. *New Orleans*, 96 U. S. 97; and Mr.

Justice Miller, speaking for the court, said: "It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." And, referring to *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, he said: "An exhaustive judicial inquiry into the meaning of the words 'due process of law,' as found in the Fifth Amendment, resulted in the unanimous decision of this court, that they do not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts."

We have seen that, in the present case, due notice was given to the petitioner, and a trial and hearing was had before the court, in the manner in which proceedings against attorneys, when the question is whether they should be struck off the roll, are always conducted.

We think that the court below did not exceed its powers in taking cognizance of the case in a summary way, and that no such irregularity occurred in the proceeding as to require this court to interpose by the writ of *mandamus*. The writ of *mandamus* is, therefore,

Refused.

MR. JUSTICE FIELD dissenting.

I am unable to concur with my associates in their disposition of this case, and I will briefly state the grounds of my dissent.

I appreciate to the fullest extent the indignation of the district judge at the lawless proceedings of the mob in his district in forcibly taking a prisoner from jail and putting him to death. There is no language of reprobation too severe for such conduct; for, however great the offence of the prisoner, the law prescribed its punishment and appointed the officers by whom it was to be executed. The usurpation of their duties, and the infliction of another punishment, were themselves the greatest of crimes, for which the actors should be held amenable to the violated laws of the State.

I join, also, with the learned justice of this court who ex-

presses the views of the majority, in his denunciation of all forms of lawless violence; and I agree with him that the enormity of the offence is increased, when the violence is aided and encouraged by an attorney, bound by his oath of office to uphold the administration of justice in the established tribunals of the country. Nor can the offence be palliated by the statement of counsel, that the fury of the mob had been excited by the attempt of the victim of its violence to outrage the person of a young female.

The question here is, not what indignation may justly be expressed for the alleged offence of the victim, or for that of his assailants; nor what should be done with a person thus guilty of participating in and encouraging the lawless proceedings of the mob: but in what way is his guilt to be determined; when does the law declare him guilty, so that the court may upon such established guilt proceed to inflict punishment for the offence and remove him from the bar.

I do not think that the Circuit Court of the United States could declare the petitioner in this case guilty of a crime against the laws of Florida upon information communicated to its judge on the streets, and thereupon cite him to show cause why he should not be stricken from the roll of attorneys of the court and be disbarred from practising therein.

And though the declaration of the court, upon what was assumed to have been the conduct of the petitioner, contained in the recital of the order directing the citation, be treated, contrary to its language, merely as a charge against him, and not as a judgment upon his conduct, I cannot think that the court had authority to formulate a charge against him of criminal conduct not connected with his professional duties, upon the verbal statements of others, made to its judge outside of the court and without the sanction of an oath. And I cannot admit that upon a charge thus formulated the petitioner could be summarily tried. In no well-ordered system of jurisprudence, by which justice is administered, can a person be tried for a criminal offence by a court, the judge of which is himself the accuser.

The first proceeding disclosed by the record is the following order: —

"CIRCUIT COURT OF THE U. S., SOUTHERN DISTRICT OF FLORIDA, MARCH TERM, 1882.

"Whereas it has come to the knowledge of this court that one J. B. Wall, an attorney of this court, did, on the sixth day of this present month, engage in and with an unlawful, tumultuous, and riotous gathering, he advising and encouraging thereto, to take from the jail of Hillsborough County, and hang by the neck until he was dead, one John, otherwise unknown, thereby showing such an utter disregard and contempt for the law and its provisions, which, as a sworn attorney, he was bound to respect and support, as shows him to be totally unfitted to occupy such position: It is hereby ordered that said J. B. Wall be cited to appear and show cause, by eleven o'clock Wednesday, the eighth instant, why his name should not be stricken from the roll of attorneys, and he be disbarred and prohibited from practising herein.

"JAMES W. LOCKE,

"TAMPA, FLORIDA, March 7, 1882. *District Judge.*"

How these matters came to the knowledge of the court is not here disclosed, but in the return of the judge to the alternative writ of *mandamus* from this court we are enlightened on this point. He states that on the 6th of March, 1882, on the adjournment of the court for dinner, in passing from the court-house he saw a person brought to the jail by two officers; that on his return to the court-house, a little over an hour afterwards, he saw the dead body of the prisoner hanging from a tree in front of the court-house door, whereby he became personally informed of the commission of a most serious offence against the laws. He also states that on the same afternoon "he was informed of the active participation in said crime of one J. B. Wall, an attorney of said court, by an eye-witness in whom the most implicit confidence could be placed, but who declined to make any charge or affidavit of such fact on account of a fear of said Wall's influence and the local feeling it would cause against him, the said witness; that not only from the direct statements of eye-witnesses, but from numerous other sources, reliable information of like import was received; whereupon said J. B. Wall, the petitioner, was, on the said seventh day of March, during a session of the Circuit Court of the United States, in open court, charged in writing by the

respondent herein, as judge, with having, with an unlawful, tumultuous, and riotous gathering, he advising and encouraging thereto, taken from the jail of Hillsborough County, and hanged to a tree by the neck until he was dead, a man to the court known only as John."

Here we have the words of the judge himself, that he acted upon the statements of parties, whose names are not given, nor is their language. His own conclusions as to their import, credibility, and weight are all that is furnished. The statements thus made to him were not evidence before the court for any purpose whatever; and would not justify its action upon any subject over which it has jurisdiction. Suppose that he was called to the stand, and asked why he had made the charge against the petitioner, and what his knowledge was on the subject. He could only have answered, "I can state nothing of my own knowledge; I can merely repeat what others have said to me; they decline to make any charge themselves; they will not confront the accused; but I have implicit confidence in their statements, though they will not verify them by oath." And yet, upon these outside, *ex parte*, unsworn sayings of others, who will not face the accused and whose words are not given, he directs an order to be entered in the Circuit Court reciting — not that the petitioner is charged by others, — not that it appears by the sworn reports of eye-witnesses, — but that "it has come to the knowledge of the court" that the petitioner had engaged in "an unlawful, tumultuous, and riotous gathering, he advising and encouraging" the same, to take a person from the county jail and hang him by the neck until he was dead, thus showing an utter disregard and contempt for the law and its provisions, and himself to be totally unfitted to occupy the position of an attorney of the court.

This is not a charge against the petitioner either in form or language, but a declaration of his guilt in advance of a hearing, founded upon what is termed "knowledge of the court." For this declared guilt he is summoned to show cause why he should not be disbarred. According to the return of the judge, the recital in the order is not correct. No such matter as is there stated ever came, in any legal way, to the knowledge of the court. Information which he gathered in conversation

with others, rumors on the streets, statements communicated outside of the court-room, secret whisperings of men who dare not or will not speak openly and verify their statements, do not constitute such "knowledge of the court" as to make it the basis of judicial proceedings affecting any one's rights. Were not this the case, no man's rights would be safe against the wanton accusation of parties on the streets, whose stories might reach the ear of the judge.

The petitioner appeared upon the citation, and objected to the authority and jurisdiction of the court to issue the rule and require him to answer it, *first*, because the rule did not show that the matters there charged took place in the presence of the court, or were brought to its knowledge by petition or complaint in writing, under oath; and, *second*, because he was charged in the rule with a high crime against the laws of Florida, not cognizable by the court, and for which, if proven, he was liable to indictment and prosecution before the State court.

The petitioner also denied counselling, advising, encouraging, or assisting an unlawful, tumultuous, and riotous gathering, or mob, in taking the person named from the jail of the county and causing his death by hanging, or that he had been guilty of any unprofessional or immoral conduct which showed him to be unfit for the position of an attorney of the court.

The court overruled the objections, and called a witness to prove the participation of the prisoner in the crime alleged. The testimony of this witness, which was reduced to writing, is contained in the record. It is to the effect that he saw the petitioner and others go to the sheriff's house on the 6th of March, and, having heard that a sheriff's *posse* had been summoned to protect the jail, he thought, by their orderly manner, that they were the *posse* going for instructions; that when they came out he heard one of the party remark, "We have got all of you we want;" that he then thought something was wrong, and followed them, and saw them coming out of the jail with the prisoner; that the petitioner was with the prisoner, walked beside him, and, witness *thinks*, had hold of him until they crossed the fence, that after that he did not see the petitioner any more until the matter was all over. The witness further

testified that he could not name any man in the crowd, which numbered over a hundred, except the sheriff; that he was excited and did not notice who they were. He did not see the petitioner leave the crowd, though he might have done so without the witness seeing him. Upon this uncertain, insufficient, and inconclusive testimony, which does not show a participation of the petitioner in "advising and encouraging" the lawless proceedings, and is consistent with his opposition to them, the judge was entirely satisfied. His language on the subject is:

"That the evidence, although of but a single witness, for grounds already stated, was to your respondent positively conclusive beyond a reasonable doubt that said J. B. Wall had been guilty of active participation in a most immoral and criminal act, and a leader in a most atrocious murder, in defiance and contempt of all law and justice, and thereby shown himself unfitted to longer retain the position of an attorney in any court over which your respondent might have the honor to preside."

Nothing could more plainly illustrate the wisdom of the rule that the accuser should not be the judge of the accusation. The judge very naturally felt great indignation at the lawless proceedings of the mob in hanging the prisoner, and, as he states, had heard reports inculpating the petitioner as a participant therein. His indignation, whether arising from such reported participation or otherwise, must have possessed him when he had the petitioner before him, for nothing else can explain the extraordinary conclusion he reached upon the testimony taken. That testimony shows merely a mingling of the petitioner with the crowd engaged in the unlawful purpose; it does not necessarily show his participation in the execution of that purpose. There was no evidence that he encouraged the proceedings. There was no evidence as to what he did say to the crowd. He may have advised against their action. The witness said nothing on the subject, nor did he see the petitioner after the crowd reached the fence. The petitioner was not seen at the execution, nor is there any evidence that he was present; and yet, the vague testimony of this excited witness, as to matters entirely consistent with innocence, is held by the judge "to be positively conclusive

beyond a reasonable doubt" that the petitioner was guilty of active participation in a criminal act and "a leader in a most atrocious murder."

There are some other things also in the return of the judge which are outside of the record of proceedings in the Circuit Court, and inconsistent with them, as that the petitioner demanded that proof should be made of the matter charged. His main position was that the court had no jurisdiction to require him to answer at all, because charged in the rule with a crime against the laws of Florida, not cognizable in that court, and for which, if proven, he was liable to indictment and conviction in the State court, — a position inconsistent with a demand of proof of the charge.

Objection is taken here — though not taken in the court below — to the form of the petitioner's denial to what is termed the charge of the judge, it being called by my brethren a negative pregnant. This is, indeed, a singular objection, in view of the fact that there was, in truth, as already said, no *formal* charge againt the petitioner. The court assumed, and declared that it had come to its knowledge, that he was guilty of a public offence which unfitted him to be an attorney, and called upon him to show cause why he should not be disbarred for it. If the court had such knowledge a denial by him was useless, and the taking of testimony on the subject an idle proceeding. He might have replied to the judge who constituted the court: "Who made you a judge to affirm my guilt, in advance of hearing, upon street rumors? I decline to answer you at all, you having thus prejudged and condemned me." With what propriety could the court have then proceeded? What legal reason could it have given for its action? I am unable to perceive that it could have given any.

Treating, however, the preannounced judgment of the court as a charge, the answer of the petitioner might have been more general than it was. It was sufficiently specific to meet all the rules of pleading in criminal cases; and I do not think that the nicety exacted in an answer to a bill of discovery in a chancery suit was required. It was enough that the answer was a denial of the offence alleged, and could in no way be tortured into any admission of guilt.

But apart from the consideration of the form of the petitioner's answer, or the weight to be given to the evidence of the excited witness, I cannot assent to the doctrine that, by virtue of any power which a court possesses over attorneys, it can try one for a felony upon a proceeding to disbar him. The Constitution of the United States and of every State has made it a part of the fundamental law of the land that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury," except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger. A felony is an infamous crime. No person charged therewith can be held *to answer* therefor; that is, can, in any other form of proceeding, be required to explain his conduct or vindicate his action. This provision excludes an inquiry, and, of course, any possible punishment for an imputed crime, except upon a conviction under such presentment or indictment. If a party is otherwise tried and punished, the constitutional guaranty is violated in his person.

If one court can, upon information communicated to its judge, in any other than a legal way, that a public offence has been committed by an attorney, call upon him to show satisfactorily that the charge is unfounded or be disbarred, so may all courts which have the power to admit attorneys, and, of course, this court. And what a spectacle would be presented if, upon reports like those in this case, or even upon written charges, that attorneys in different parts of the country have committed murder, burglary, forgery, larceny, embezzlement, or some other public offence, they could be cited here to answer summarily as to such charges without being confronted by their accusers, without previous indictment, without trial by jury, and, of course, without the benefit of the presumptions of innocence which accompany every one until legally convicted. With what curious and wondering eyes would such proceedings be watched, when A. should be summoned from one part of the country on a charge of murder, B. from another part of the country on a charge of burglary, C. from another part on a charge of larceny, D. from still another on a charge of having violated his marriage vows, and others on charges embracing

different felonies! Such proceedings would be scandalous, and would shock every one who regards with favor the guarantees of personal rights in the Constitution. They would not and ought not to be tolerated by the country; and yet how would they differ from the case before us? It is no excuse to say that the punishment inflicted upon the petitioner is not that prescribed by the law for the public offence charged, and that it is only the latter which requires previous presentment or indictment. The Constitution declares that "no person shall be held to answer" for any infamous offence, that is, to explain and justify his conduct upon such a charge, except when made by the presentment or indictment of a grand jury, without reference to the punishment that may follow on its being established. That instrument looks to the substance of things, and not to mere forms. Its purpose is to protect every one against wanton complaints of the commission of a public offence. It therefore confides the power of accusation for such an offence to a specially constituted body; and interdicts all trial, and, of course, all punishment, except upon its formal presentation. This interdict would be of little protection if it could be evaded by a mere change in the extent or nature of the punishment.

In the test oath case from Missouri we have an illustration of an attempt to evade a constitutional inhibition, and of its futility. That State had in 1865 adopted a new constitution, which prescribed an oath to be taken by persons filling certain offices and trusts and pursuing various vocations within its limits. They were required to deny that they had done certain things, or by act or word had manifested certain desires and sympathies. The oath, divided into its separate parts, embraced thirty distinct affirmations respecting the past conduct of the affiant, extending even to his words, desires, and sympathies.

Every person unable to take this oath was declared by the Constitution incapable of holding in the State "any office of honor, trust, or profit under its authority, or of being an officer, councilman, director or trustee, or other manager of any corporation, public or private, now existing or hereafter established by its authority, or of acting as a professor or teacher in any educational institution, or in any common or other school, or of

holding any real estate or other property in trust for the use of any church, religious society, or congregation."

And every person, at the time the Constitution took effect, holding any of the offices, trusts, or positions mentioned, was required, within sixty days thereafter, to take the oath; and, if he failed to comply with this requirement, it was declared that his office, trust, or position should *ipso facto* become vacant.

No person, after the expiration of the sixty days, was permitted, without taking the oath, "to practise as an attorney or counsellor-at-law," nor after that period could "any person be competent, as a bishop, priest, deacon, minister, elder, or other clergyman, of any religious persuasion, sect, or denomination, to teach, or preach, or solemnize marriages."

Fine and imprisonment were prescribed as a punishment for holding or exercising any of "the offices, positions, trusts, professions, or functions" specified, without having taken the oath; and false swearing or affirmation in taking it was declared to be perjury, punishable by imprisonment in the penitentiary.

A priest of the Roman Catholic Church was indicted in a Circuit Court of Missouri and convicted of the crime of teaching and preaching as a priest and minister of that religious denomination, without having first taken the oath, and was sentenced to pay a fine of $500, and to be committed to jail until the same was paid. On appeal to the Supreme Court of the State the judgment was affirmed, and the case was brought on error to this court. It was plain that if the power existed in the State to exact from parties this oath respecting their past conduct, desires, and sympathies, as a condition of their being permitted to continue in their vocations, or to hold certain trusts, it might be used, and, on occasions of excitement to which all communities are subject, would be used to their oppression and even ruin. The State might require such oath for any period of their past lives, might call upon them to affirm whether they had observed the Ten Commandments, or had discharged any particular civil or moral duty, or had entertained any particular sentiments, or desires, or sympathies, as a condition of their being allowed to engage in one of the ordinary pursuits of life, in a profession, trade, or business. It might impose conditions which individuals and whole classes in

the community would be unable to comply with, and thus deprive them of civil and political rights. Under this form of legislation no oppression can be named which might not have been effected.

A large portion of the people of Missouri were unable to take the oath. It was, therefore, contended that the clauses of its Constitution which required priests and clergymen to take and subscribe the oath as a condition of their being allowed to continue in the exercise of their professions, and preach and teach, operated upon those who could not take it as a bill of attainder within the meaning of the provision of the Federal Constitution prohibiting the States from passing bills of that character. With respect to them the clauses amounted to a legislative deprivation of their rights.

It was also contended that in thus depriving priests and clergymen of the right to preach and teach, the clauses imposed a penalty for some acts which were innocent at the time they were committed, and increased the penalty for other acts which at the time constituted public offences, and in both particulars violated the provision of the Federal Constitution prohibiting the passage by the States of an *ex post facto* law.

On the other hand, it was contended that the provisions of the Constitution of Missouri exacting the oath mentioned, merely prescribed conditions upon which members of the political body might exercise their various callings; that bills of pains and penalties, which are included under the head of bills of attainder, and *ex post facto* laws, are such as relate exclusively to crimes and their punishments; that they are in terms acts defining and punishing crimes and designating the persons to be affected by them, and do not bear any resemblance to the provisions of the Constitution of Missouri.

There was much force in the objections thus urged to the position that the clauses in the Missouri Constitution constituted a bill of attainder and an *ex post facto* law; and had the court looked to the form rather than to the substance of things, they must have prevailed. But the court did not thus limit its view. It regarded the constitutional guarantees as applying wherever private rights were to be protected against legislative deprivation, whatever the form of the legislation. And

it could not perceive any substantial difference between legislation imposing upon parties impossible conditions as to past conduct for the enjoyment of existing rights, and legislation in terms depriving them of such rights, or imposing as a punishment for past conduct the forfeiture of those rights. It therefore adjudged the clauses of the Missouri Constitution in question to be invalid on both grounds urged, as a bill of attainder and an *ex post facto* law. They accomplished precisely what the most formal enactments of that nature would have done, and were, therefore, in like manner prohibited. "The legal result," said the court, "must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

I have been thus particular in the statement of the Cummings case, for it seems to me that the rule of construction there applied should be extended so as to protect the citizen from answering in any form, or being punished in any way, for an infamous offence, except, as the Constitution prescribes, on a presentment or indictment of a grand jury. Here, under the form of a civil proceeding, a party is summoned to answer, and is punished for an alleged criminal offence, to try which the Circuit Court has confessedly no jurisdiction, and which is in no way connected with his professional conduct. The protection of the Constitution should not be thus lost, though the punishment be not one prescribed by statute, but one resting in the discretion of the court. I know, of course, that this court has, with the exception of two of its members, been entirely changed in its *personnel* since the Cummings case was decided. I am the only living member of the majority of the court which, sixteen years ago, gave that judgment. I would fain hope, however, that this change may not lead to a change in the construction of clauses in the Constitution intended for the protection of personal rights, even though its present mem-

bers, if then judges, might not have assented to the decision, and however much they may be disposed to follow their own peculiar views where rights of property only are involved. I am of opinion that all the guarantees of the Constitution designed to secure private rights, whether of person or property, should be broadly and liberally interpreted so as to meet and protect against every form of oppression at which they were aimed, however disguised and in whatever shape presented. They ought not to be emasculated and their protective force and energy frittered away and lost by a construction which will leave only the dead letter for our regard when the living spirit is gone.

What, then, are the relations between attorneys and counsellors-at-law and the courts; and what is the power which the latter possess over them; and under what circumstances can they be disbarred? There is much vagueness of thought on this subject in discussions of counsel and in opinions of courts. Doctrines are sometimes advanced upholding the most arbitrary power in the courts, utterly inconsistent with any manly independence of the bar. The books, unfortunately, contain numerous instances where, for slight offences, parties have been subjected to oppressive fines, or deprived of their offices, and, consequently, of their means of livelihood, in the most arbitrary and tyrannical manner. The power to punish for contempt — a power necessarily incident to all courts for the preservation of order and decorum in their presence — was formerly so often abused for the purpose of gratifying personal dislikes, as to cause general complaint, and lead to legislation defining the power and designating the cases in which it might be exercised. The act of Congress of March 2, 1831, c. 99, limits the power of the courts of the United States in this respect to three classes of cases: *first*, where there has been misbehavior of a person in the presence of the court or so near thereto as to obstruct the administration of justice; *second*, where there has been misbehavior of any officer of the court in his official transactions; and, *third*, where there has been disobedience or resistance by any officer, party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the court. The power, as thus seen, — so far as

the punishment of contempts is concerned, — can only be exercised by the courts of the United States to insure order and decorum in their presence; faithfulness on the part of their officers in their official transactions; and obedience to their lawful orders, judgments, and process. *Ex parte Robinson*, 19 Wall. 505.

The power to disbar attorneys in proper cases, though not, perhaps, affected by this law, is not to be exercised arbitrarily or tyrannically. Under our institutions arbitrary power over another's lawful pursuits is not vested in any man nor in any tribunal. It is odious wherever exhibited, and nowhere does it appear more so than when exercised by a judicial officer toward a member of the bar practising before him.

Attorneys and counsellors-at-law — and the two characters are in this country generally united in the same person — are officers of the court, admitted to be such by its order upon evidence that they possess sufficient learning to advise as to the legal rights of parties, and to conduct proceedings in the courts for their prosecution or defence, and that they have such fair private characters as to insure fidelity to the interests intrusted to their care. The order of admission, as said in the Garland case, is the judgment of the court that they possess the requisite qualifications of learning and character, and are entitled to appear as attorneys and counsellors and to conduct causes therein. Thenceforth they are responsible to the court for professional misconduct and entitled to hold their offices during good behavior. 4 Wall. 333, 387.

Their office, as was also said in the same case, is not held as a matter of grace and favor. The right which it confers is something more than a mere license, revocable at the pleasure of the court. It is a right of which they can be deprived only by its judgment for moral or professional delinquency.

The oath which every attorney and counsellor is required to take on his admission briefly expresses his duties. It is substantially this: that he will support the Constitution of the United States, and "conduct himself as an attorney and counsellor of the court uprightly and according to law." This implies not only obedience to the Constitution and laws, but that he will, to the best of his ability, advise his clients as to their

legal rights, and will discharge with scrupulous fidelity the duties intrusted to him; that he will at all times maintain the respect due to the courts and judicial officers; that he will conform to the rules prescribed by them for his conduct in the management of causes; that he will never attempt to mislead them by artifice or any false statement of fact or intentional misstatement of the law, and will never employ any means for the advancement of the causes confided to him except such as are consistent with truth and honor. So long as he carries out these requirements of his oath he will come within the rule of "good behavior," and no complaint of his professional standing can be made. The authority which the court holds over him and the exercise of his profession extends so far, and so far only, as to insure a compliance with these requirements. It is for a disregard of them, therefore, that is, for professional delinquency, and the loss of character for integrity and trustworthiness, or, in other words, for moral delinquency, which a disregard of them manifests, that the court will summarily act upon his office and disbar him. In other words, the summary jurisdiction of the court in this respect will only be exercised: *first*, for misconduct of the attorney in cases and matters in which he has been employed or consulted professionally, or matters in which, from their nature, it must be presumed he was employed by reason of his professional character; and, *second*, for such misconduct outside of his profession as shows the want of that integrity and trustworthiness which is essential to insure fidelity to interests intrusted to him professionally. The commission of a felony or a misdemeanor involving moral turpitude is of itself the strongest proof of such misconduct as will justify an expulsion from the bar; but the only evidence which the court can receive of the commission of the offence, when it is not admitted by the party, is a record of his conviction. Of this I shall presently speak.

When the charge against the attorney is of misconduct in his office, and that involves, as it sometimes may, the commission of a public offence, for which he may be prosecuted criminally, the inquiry should proceed only so far as to determine the question of professional delinquency, and he should be left to the proper tribunals for the punishment of the crime com-

mitted. And on such an inquiry no answer will be required of him which would tend to his crimination. Thus, to illustrate, if he has collected money for his client, and has not paid it over, the court, upon appropriate complaint, will order him to be cited to show cause why he should not pay it. If, upon the citation, a sufficient reason is not given for the retention of the money, the court will enter an order directing him to pay it immediately or by a day designated. Should he still refuse, he may then be disbarred for disobedience to the order and for the professional delinquency thereby involved; but for the offence of embezzlement or other crime, committed in the retention of the money, he will be turned over to the criminal courts. Or, take the case suggested on the argument: should an attorney, in the course of a trial, get into a personal collision with the opposing counsel or with a witness, and assault him with a deadly weapon, or kill him, the court would undoubtedly require the offender to show cause why he should not be expelled from the bar for the violence, disturbance, and breach of the peace committed in its presence. It would be sufficient to justify expulsion that he had so far forgotten the proprieties of the place and the respect due to the court as to engage in a violent assault in its presence. But for the trial of the offence of committing a deadly assault, or for the homicide, he would be turned over to the criminal courts. Or, take another case mentioned on the argument, where an attorney has presented a false affidavit, or represented as genuine a fictitious paper. The use of such documents, knowing their character, is a fraud upon the court, an attempt to deceive it, and constitutes such professional misconduct as to justify the imposition of a heavy fine upon him or his temporary suspension or expulsion from the bar, without reference to the materiality of the contents of the false affidavit or of the fictitious paper; but for the crimes involved in their use he should be sent to the proper tribunals, because he cannot be tried therefor, on a motion to punish him for a contempt or to disbar him.

It is because of this limitation upon the extent of judicial inquiry into such matters that a proceeding for purely professional misconduct against an attorney may be taken in any way which will sufficiently apprise him of the grounds upon

which it is founded, and afford him an opportunity to be heard. It is not as thus limited a criminal proceeding in any proper sense, requiring full and formal allegations with the precision of an indictment. As said in *Randall* v. *Brigham*, where a letter of a party defrauded, laid before a grand jury and communicated by its direction to the court, was the foundation of proceedings against an attorney: "Such proceedings are often instituted upon information developed in the progress of a cause, or from what the court learns of the conduct of the attorney from its own observation. Sometimes they are moved by third parties upon affidavit; and sometimes they are taken by the court upon its own motion. All that is requisite to their validity is that when not taken for matters occurring in open court, in the presence of the judges, notice shall be given to the attorney of the charges made, and opportunity afforded him for explanation and defence. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation." 7 Wall. 523, 540. The objection here is that this recognized limitation upon judicial inquiry in such cases is exceeded, and the civil proceeding is made the means of inflicting punishment for a criminal offence in no way connected with the party's professional conduct.

When the proceeding to disbar an attorney is taken for misconduct outside of his profession, the inquiry should be confined to such matters, not constituting indictable offences, as may show him unfit to be a member of the bar; that is, as not possessing that integrity and trustworthiness which will insure fidelity to the interests intrusted to him professionally, and to the inspection of any record of conviction against him for a felony or a misdemeanor involving moral turpitude. It is not for every moral offence which may leave a stain upon character that courts can summon an attorney to account. Many persons, eminent at the bar, have been chargeable with moral delinquencies which were justly a cause of reproach to them; some have been frequenters of the gaming-table, some have been dissolute in their habits, some have been indifferent to their pecuniary obligations, some have wasted estates in riotous living, some have been engaged in broils and quarrels disturb-

ing the public peace; but for none of these things could the court interfere and summon the attorney to answer, and if his conduct should not be satisfactorily explained, proceed to disbar him. It is only for that moral delinquency which consists in a want of integrity and trustworthiness, and renders him an unsafe person to manage the legal business of others, that the courts can interfere and summon him before them. He is disbarred in such case for the protection both of the court and of the public.

A conviction of a felony or a misdemeanor involving moral turpitude implies the absence of qualities which fit one for an office of trust, where the rights and property of others are concerned. The record of conviction is conclusive evidence on this point. Such conviction, as already said, can follow only a regular trial upon the presentment or indictment of a grand jury. It cannot follow from any proceeding of the court on a motion to disbar, for the reason already given, that no one can be required to answer for such an offence except in one way. If a party indicted is, upon trial, acquitted, the court cannot proceed to retry him for the offence upon such a motion. He may answer, after acquittal, that he never committed the offence, and that no tribunal can take any legal proceeding against him on the assumption that he had been wrongfully acquitted. And what the court cannot do after acquittal it cannot do by such a proceeding before trial. If the court, after acquittal, can still proceed for the alleged offence, as a majority of my brethren declare it may, and call upon him to show that he is not guilty or be disbarred, there is a defect in our Constitution and laws which has, up to this day, remained undiscovered. Hitherto it has always been supposed that the record of acquittal of a public offence, after a trial by a jury, was conclusive evidence, at all times and in all places, of the party's innocence. This doctrine, until to-day, has been supposed to be immovably embedded in our jurisprudence.

There are many cases in the books where the view I have taken of the authority of the court over attorneys and counsellors-at-law is recognized and acted upon. In a case in the Supreme Court of New Jersey, 2 Hals. (N. J.) 162, reported without a name out of respect to the friends of the party im-

plicated, an application was made on behalf of members of the bar for a rule that a certain attorney show cause why his name should not be stricken from the rolls, upon an allegation that he had been guilty of larceny. The moving party stated in his application that it was a matter of notoriety that the attorney had purloined books, to a considerable amount, from persons who were at the time in court and ready, when called upon, to substantiate the charge. The counsel, therefore, on behalf of members of the bar, called upon the court to relieve them from the reproach of having the man attached to their profession, and from the disgrace of being compelled, in their professional duties, to have intercourse with one with whom they would be ashamed to associate in private life; and that the court had undoubtedly the power to grant the rule, for, as it was essential to the admission of an attorney that he should be of good moral character, it must be equally essential that he should continue to be such. But the Chief Justice said: "The offence of which it is alleged this man has been guilty is neither a contempt of court nor does it fall within the denomination of malpractice. It would appear to me, therefore, that he must be first convicted of the crime by a jury of his countrymen before we can proceed against him for such an offence; for, suppose he should be brought to the bar and should say he was not guilty, we could not try the fact."

The case was then taken under advisement, and at a subsequent day the court said, speaking by the Chief Justice: "We have reflected upon this case, and do not see how we can do anything in it, because the court seems to be confined to cases of malpractice or to crimes which are in the nature of *crimen falsi*, and of which there has been a conviction." Justice Ford, of the court, added: "An attorney may be struck off the roll, *first*, for a breach of the rules of the court; *second*, for breach of any of his official duties; *third*, for all such crimes and misdemeanors as affect his moral character. But in this third class of cases we cannot proceed in the ordinary way; there ought always to be a previous conviction before this court can interfere. All the cases cited sanction this distinction, except the case from the District of Columbia, which is anomalous." The rule was, therefore, refused.

In *Ex parte Steinman and Hensel*, 95 Pa. St. 220, the parties, members of the bar of Lancaster County, in Pennsylvania, were editors of a newspaper published in the county. In one of its numbers an article appeared which charged that the judge of the Court of Quarter Sessions of the county had decided a case wrongfully from motives of political partisanship. The court thereupon sent for the parties, and on their appearance they admitted that they were editors of the paper and that as such they were responsible for the publication. The court then entered a rule upon them to show cause why they should not be disbarred and their names stricken from the roll of attorneys for misbehavior in their offices. To this rule they answered, setting up, among other things, that if the charge was that they had published a libellous article, it was that they had committed an indictable offence, not in the presence of the court, or while acting as its officers, and therefore could not be called upon to answer the rule until they should have been tried and convicted, according to law, for the offence; and that the court was not competent to determine in that form of proceeding that they did unlawfully and maliciously publish, out of court, a libel upon the court, and to hear and determine disputed questions of fact involving the motives of the parties and the official conduct of the court. The rule, however, was made absolute, and the names of the parties were ordered to be stricken from the roll of attorneys. They then took the case on writ of error to the Supreme Court of the State, where the judgment was reversed, and it was ordered that the parties be restored to the bar. Chief Justice Sharswood, in delivering the opinion of the court, said: —

"No question can be made of the power of a court to strike a member of the bar from the roll for official misconduct in or out of court. By the seventy-third section of the act of April 14, 1834, it is expressly enacted that 'if any attorney-at-law shall misbehave himself in his office of attorney he shall be liable to suspension, removal from office, or to such other penalties as have heretofore been allowed in such cases by the laws of this Commonwealth.' We do not mean to say — for the case does not call for such an opinion — that there may not be cases of misconduct not strictly professional which would clearly

show a person not to be fit to be an attorney, nor fit to associate with honest men. Thus, if he was proved to be a thief, a forger, a perjurer or guilty of other offences of the *crimen falsi*. But no one, we suppose, will contend that for such an offence he can be summarily convicted and disbarred by the court without a formal indictment, trial, and conviction by a jury, or upon confession in open court. Whether a libel is an offence of such a character may be a question, but certain it is that if the libel in this case had been upon a private individual, or upon a public officer, such even as the district attorney, the court could not have summarily convicted the defendants and disbarred them." p. 237.

A similar doctrine obtains in the courts of England. Thus, in a case in 5 Barn. & Adol. 1088, the Solicitor-General of England moved the Court of King's Bench for a rule calling on two attorneys of the court to show cause why they should not be struck off the roll, on affidavits charging them with professional misconduct in certain pecuniary transactions. Lord Denman, the Chief Justice, replied: "The facts stated amount to an indictable offence. Is it not more satisfactory that the case should go to a trial? I have known applications of this kind, after conviction, upon charges involving professional misconduct; but we should be cautious of putting parties in a situation where, by answering, they might furnish a case against themselves, on an indictment to be afterwards preferred. On an application calling upon an attorney to answer the matters of an affidavit, it is not usual to grant the rule if an indictable offence is charged." The court, however, desired the Solicitor-General to see if any precedent could be found of such an application having been granted. The Solicitor-General afterwards stated that he had been unable to find any, and the rule was discharged. My brethren are mistaken in supposing that in this case the attorneys were required to answer under oath the charges made.

In re ——, 3 Nev. & P. 389, a motion was made to the Court of Queen's Bench to strike an attorney off the roll on an affidavit alleging a distinct case of perjury by him. The attorney had sworn to the sum of £374 as the expenses of witnesses, which was reduced before the master to £47. It was

contended that the court could exercise its summary jurisdiction on the ground of the perjury. But the Chief Justice replied: "Would not an indictment for perjury lie upon these facts? We are not in the habit of interposing in such a case, unless there is something amounting to an admission on the part of the attorney which would render the interposition of a jury unnecessary." The moving counsel answered that there was enough in the affidavit to show a distinct case of perjury, but that there was no admission. The rule was, therefore, refused.

To the same purport are numerous other adjudications, and their force is not weakened by the circumstance that it is also held that it is no objection to the exercise of the summary jurisdiction of the court that the conduct constituting the delinquency, for which disbarment is moved, may subject the party to indictment. When such is the case he is not required to answer the affidavits charging the official delinquency, for no one can be compelled to criminate himself, and the court confines its inquiry strictly to such acts as are inconsistent with the attorney's duty in his profession. It looks only to the professional conduct of the attorney, and acts upon that.

In *Stephens* v. *Hill*, which was before the Court of Exchequer, a distinction was drawn between the misconduct of an attorney outside of a proceeding in court which might subject him to an indictment, and such misconduct committed by him in a proceeding in court. For the former no motion to disbar would be entertained; for the latter the motion would be heard. There an attorney for the defendants had persuaded a material witness for the plaintiff to absent himself from the trial of the cause, and had undertaken to indemnify him for any damage he might sustain for so doing. Upon affidavits disclosing this matter, application was made to disbar the attorney. It was objected that the court would not exercise its summary jurisdiction when the misconduct charged amounts to an indictable offence, as was the conspiracy in which the attorney was engaged. But the Chief Baron, Lord Abinger, answered that he never understood that an attorney might not be struck off the roll for misconduct in *a cause in which he was an attorney* merely because the offence imputed to him was of

such a nature that he might have been indicted for it; that so long as he had been in Westminster Hall he had never heard of such a rule, though the court would not require the attorney to answer the affidavits. "If, indeed," said the Chief Baron, speaking for the court, "a case should occur where an attorney has been guilty of some professional misconduct, for which the court by its summary jurisdiction might compel him to do justice, and at the same time has been guilty of something indictable in itself, but not arising out of the cause, the court would not inquire into that with a view of striking him off the roll, but would leave the party aggrieved to his remedy by a criminal prosecution." And, again, "Where, indeed, the attorney is indicted for some matter not connected with the practice of his profession of an attorney, that also is a ground for striking him off the roll, although in that case it cannot be done until after conviction by a jury." 10 Mee. & W. 28, 32, 33. The conduct of the attorney in that case tended to defeat the administration of justice, and was grossly dishonorable. He had employed for the success of his cause means inconsistent with truth and honor. He was, therefore, rightly disbarred without reference to his liability to a criminal prosecution for his conduct.

There is no case I have been able to find, after a somewhat extended examination of the reports, where, for an indictable offence, wholly distinct from the attorney's professional conduct, the commission of which was not admitted, he has been compelled, in advance of trial and conviction, to show cause why he should not be disbarred, except one in Tennessee for accepting a challenge to fight a duel and killing his antagonist. *Smith* v. *The State*, 1 Yerg. (Tenn.) 228. This case is exceptional, and finds no support in the decisions of the courts of other States. There is no case at all like the one at bar to be found in the reports of the courts of England or of any of the States of the Union.

In the numerous cases cited in the opinion of my brethren, the matter which was the subject of complaint, and the ground of the action of the court, related to the conduct of the party in his professional business or in business connected with or growing out of his profession. Thus, the advertisement of an

attorney that he could procure divorces for causes not known to the law, without publicity, or reference to the parties' residence; colluding with a wife to manufacture evidence to procure a divorce; the misapplication by him of funds collected; his bribery of witnesses, hiring them to keep out of the way, or to disregard a subpœna; his falsely personating another in legal proceedings; instituting suits without authority; knowingly taking insufficient security; forging an affidavit to change a venue; substituting the name of his client for his own in an affidavit to procure alimony; altering a letter to a judge in order to secure the allowance of bail; attempting to make an opposing attorney drunk, in order to obtain an advantage of him on the trial of a cause; obtaining money from a client by false representations respecting the latter's title to lands, and advances for taxes; and many other like matters, which operated as a fraud upon the court and tended to deceive it, and were inconsistent with professional honor and integrity, were very properly considered as sufficient grounds for temporary suspension or absolute expulsion from the bar. And in this class of cases we sometimes find objections were taken that the offences charged subjected the attorney to liability for indictment, and for that reason should not be considered; and it was in answer to such objections that language was used which apparently conflicts with the views I have expressed, but not really so when read in connection with the facts. In those cases the conduct of the attorney, even when furnishing ground for indictment, was, independently of its criminal character, open to consideration on a motion to disbar, so far as it affected him professionally; and so it was said that it was no objection to such consideration that he might have been also indicted for the offence committed, — language which can have no application where the offence, as in this case, had no connection with the party's professional conduct.

In illustration of this statement I will make a brief reference to some of the cases cited by my brethren and upon which they seem chiefly to rely. That of *Stephens* v. *Hill*, in the Court of Exchequer, already explained, confirms what I have said. There, while holding that the fact that the matter complained of might subject the attorney to an indictment would

not prevent an inquiry into it, so far as it affected his professional conduct, Lord Abinger takes particular pains to say, as appears from the quotation from his opinion which I have given, that where the matter is not connected with the practice of the attorney's profession, though it might be ground for striking him from the roll, "in that case it cannot be done until after conviction by a jury."

In *Re Blake*, 3 El. & El. 34, the court held that its summary jurisdiction over its attorneys is not limited to cases in which they have been guilty of misconduct, such as amounts to an indictable offence, or arises in the ordinary course of their professional practice, but extends to all cases of gross misconduct on their part, in any matter in which they may, from its nature, be fairly presumed to have been employed in consequence of their professional character. In that case money had been lent to an attorney, previously known and employed as such, upon his note, and a deed of assignment of a mortgage on an estate in Ireland, by which a greater amount was secured to him. The estate getting into the Irish Encumbered Estates Court, the attorney borrowed the deed from his creditor for the purpose, as alleged, of supporting his claim in that court, but in reality in order to obtain the payment of the amount secured to him. Having established his right to that payment, he returned the deed to the creditor, and afterwards received the whole amount secured and appropriated it to his own use. It is with reference to these facts that Chief Justice Cockburn uses the language quoted by my brethren. He said that although Blake applied to the lender in the first instance, as an attorney, he thought the transaction had ultimately resolved itself into a mere loan between them as individuals. But the transaction had evidently grown out of their former relation as attorney and client. Mr. Justice Crompton, in concurring with the Chief Justice, said: "In the present case, I cannot say that Blake's fraud was not committed in a matter connected with his professional character. If he did not act in it as an attorney, he at all events took advantage of his professional position to deceive Beevirs" (the lender).

In *Re Hill*, Law Rep. 3 Q. B. 543, an attorney, acting as a

clerk to a firm of attorneys, in completing the sale of certain property, received the balance of the purchase-money and appropriated it to his own use. On affidavits stating the facts, a motion was made to strike him off the rolls. He admitted the misappropriation, and was accordingly suspended for twelve months. Said Chief Justice Cockburn: "In this case, if the delinquent had been proceeded against criminally upon the facts admitted by him, it is plain that he would have been convicted of embezzlement, and upon that conviction being brought before us, we should have been bound to act. If there had been a conflict of evidence upon the affidavits, that might be a very sufficient reason why the court should not interfere until the conviction had taken place; but here we have the person against whom the application is made admitting the facts." It is difficult to see the pertinency of this decision to the position taken by my brethren. These two cases are, in the language used, the strongest to be found in the reports on that side; but their facts give it no strength whatever.

In *Penobscot Bar* v. *Kimball*, 64 Me. 140, the attorney had been convicted of forging a deposition used by him in a suit against his wife for a divorce; and though pardoned for the crime, the fraud upon the court remained, and for that and for other disreputable practices and professional misconduct, rendering him "unfit and unsafe to be intrusted with the powers, duties, and responsibilities of the legal profession," he was disbarred.

In *Delano's Case*, 58 N. H. 5, where an attorney was disbarred by the Supreme Court of New Hampshire for wrongfully appropriating to his own use money of a town received by him as a collector of taxes, the commission of the offence was admitted. This is evident from the statement of the court in its opinion that "he and his wife and family did what they could to make good the loss to the town, but with only partial success."

In *Perry* v. *The State*, 3 Greene (Iowa), 550, the false swearing charged as one of the grounds of complaint against the attorney was committed in a cause managed by him, in which he voluntarily appeared as a witness, thus practising a

fraud upon the court by employing to sustain his cause means inconsistent with truth and honor.

In *Ex parte Walls*, 64 Ind. 461, the attorney had forged an affidavit to obtain a change of venue, and had thus grossly imposed upon the court. For this imposition, independently of the crime committed, he was properly disbarred.

In *Ex parte Burr*, 2 Cranch C. C. 379, the charges against the attorney were for malpractice in his profession, in advising a person in jail, who was either a recognized witness or a defendant for whom some person was special bail, to run away; instituting suits against parties, and appearing for parties without authority; bringing vexatious and frivolous suits, many of them for persons utterly insolvent; purchasing a lot at a trustee's sale of an insolvent's estate under unfair circumstances; making fictitious claims and bringing suits with a view to extort money; and taking a bill of sale from one about to be distrained for rent to prevent such distress. These charges having been sustained, the attorney was rightly suspended from practice for one year.

In *Re John Percy*, 36 N. Y. 651, there were several charges against the attorney, such as that his general reputation was bad; that he had been several times indicted for perjury, one or more of which indictments were pending; that he was a common mover and maintainer of suits on slight and frivolous pretexts; and that his personal and professional reputation had been otherwise impeached in a trial at the circuit. But the court appears to have based its action upon the character of the attorney as a vexatious mover of suits on frivolous grounds. "He was crowding the calendar," said the court, "with vast numbers of libel suits in his own favor, and in the habit of indicating additional libel suits upon the answers to those previously brought by him. In one instance, at least, he had sued his client in a justice's court, and when beaten upon trial, instead of appealing from the judgment he commenced numerous other suits against him in different forms for the same cause, when he must have known that the demand was barred by the first judgment rendered. The only inquiry is whether, in such a case, the court has the power to protect the public by preventing such persons from practising as attorneys and counsellors

in the courts of the State, and by that means harass its citizens." And the court held that it had the power under a special statute of the State authorizing the removal or suspension of attorneys and counsellors, when guilty of any deceit, malpractice, or misdemeanor; and that its power was not limited to cases where such deceit, malpractice, or misdemeanor was practised or committed in the exercise of the profession only, but under the statute extended to cases where there was general bad character or misconduct.

None of these cases, as is manifest from the statement I have made, covers that of an indictable offence, wholly distinct from the attorney's professional conduct. None of them countenances the extraordinary authority of the courts over attorneys and counsellors asserted by my brethren. And, indeed, if the law be that a Circuit Court of the United States, upon whisperings in the ear of one of its judges on the streets, or upon information derived from rumor, or in some other irregular way, that an attorney has committed a public offence, having no relation to the discharge of his professional duties, can summon him to answer for the offence in advance of trial or conviction and summarily punish him, it is time the law was changed by statute. Such a power cannot be safely intrusted to any tribunal. It might be exercised under the excitement of passion and prejudice, as the records of courts abundantly show. Its maintenance would tend to repress all independence on the part of the bar. Men of high honor would hesitate to join a profession in which their conduct might be subjected to investigation, censure, and punishment from imputations and charges thus secretly made.

Seeing that this must be the inevitable result of such an unlimited power of the court over its attorneys, my brethren are careful to express the opinion that it should seldom be exercised, when the offence charged against the attorney is indictable, until after trial and conviction, unless its commission is admitted.

But the possession of the power being conceded, and its exercise being discretionary, there is in the hands of an unscrupulous, vindictive, or passionate judge, means of oppression and cruelty which should not be allowed in any free government.

To disbar an attorney is to inflict upon him a punishment of the severest character. He is admitted to the bar only after years of study. The profession may be to him the source of great emolument. If possessed of fair learning and ability, he may reasonably expect to receive from his practice an income of several thousand dollars a year, — equal to that derived from a capital of one or more hundred thousand dollars. To disbar him having such a practice is equivalent to depriving him of this capital. It would often entail poverty upon himself, and destitution upon his family. Surely the tremendous power of inflicting such a punishment should never be permitted to be exercised unless absolutely necessary to protect the court and the public from one shown by the clearest legal proof to be unfit to be a member of an honorable profession.

To disbar an attorney for an indictable offence not connected with his professional conduct, before trial and conviction, is also to inflict an additional wrong upon him. It is to give the moral weight of the court's judgment against him upon the trial on an indictment for that offence.

I am of opinion, therefore, that the prayer of the petitioner should be granted, and a peremptory *mandamus* directed to the Circuit Court to vacate the order of expulsion and restore him to the bar. The writ is the appropriate remedy in a case where the court below, in disbarring an attorney, has exceeded its jurisdiction. *Ex parte Bradley*, 7 Wall. 364; *Ex parte Robinson*, 19 id. 505.

ROTH v. EHMAN.

This court has no jurisdiction to re-examine the judgment of a State court recognizing as valid the decree of a foreign court annulling a marriage.

MOTION to dismiss a writ of error to the Supreme Court of the State of Illinois.

The case is sufficiently stated in the opinion of the court.

Mr. Julius Rosenthal and *Mr. A. M. Pence* in support of the motion.

Mr. C. M. Harris in opposition thereto.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The only question in this case controverted below was whether Madelaine Roth, the plaintiff in error, was the widow of John George Roth, deceased, and that depended entirely on the validity of the decree of the Royal Matrimonial Court of Elwangen, in the Kingdom of Wurtemburg, annulling the marriage of the parties. The Supreme Court of Illinois decided in favor of the validity of the Wurtemburg decree, and consequently that she was not his widow and not entitled to dower in his estate, or to inheritance under the laws of Illinois. This presents no question of which we can take cognizance under sect. 709 of the Revised Statutes. No right, title, privilege, or immunity which could be claimed under the authority of the United States was involved, and the validity of no treaty or statute of, or any authority exercised under, the United States was drawn in question. Neither was there any statute or authority of the State relied on which was in conflict with the Constitution, treaties, or laws of the United States.

Motion granted.

UNITED STATES *v.* PHELPS.

1. A claim for the appraisement of goods and the reduction of the duty thereon, by reason of the damage which they sustained during the voyage of importation, may be allowed, although not made until after they were entered at the custom-house at their full invoice value and the estimated duties thereon paid. *Shelton* v. *The Collector*, 5 Wall. 113, so far as it conflicts with this ruling, is overruled.
2. Section 2928, Rev. Stat., has exclusive reference to goods taken from a wreck.

ERROR to the Circuit Court of the United States for the Southern District of New York.

Phelps Brothers & Co. imported, August, 1876, from foreign parts into the port of New York 5,861 boxes of lemons, the value of which at the market when and where they were purchased was $24,006. The duty on them, at twenty per cent *ad valorem*, was $4,801.20, the payment of which was admitted by the United States except $1,151.60, to recover which sum this action was brought against the importers in the proper District Court of the United States.

The plaintiff having proved the foregoing facts, the defendants offered evidence showing that they, on the day of the importation of the lemons, made an entry thereof at the custom-house in New York at their full invoice price, and paid the estimated amount of duty thereon, if they were in sound condition; that within seven days thereafter the defendants applied for an allowance for damage to the lemons on the voyage, and that after a subsequent examination and appraisement of the damage an allowance was thereupon made, the duties whereon, at twenty per cent, amounted to $1,151.60, in accordance wherewith the entry was liquidated in October of that year and the United States paid that sum to the defendants.

To this evidence the plaintiff objected, on the ground that the damage allowance should have been applied for and the damage ascertained before the entry of the goods; that as the application was not made nor the amount of damage ascertained until after the entry, the proceeding was irregular and without warrant of law, and that the defendants could acquire no benefit or advantage from any allowance made in

pursuance thereof. The court overruled this objection, and admitted the evidence; to which ruling and admission the plaintiff duly excepted.

The plaintiff thereupon requested the court to charge the jury that, as the goods had been entered at the full invoice price in the first instance, and the application for allowance, the examination and appraisement not made, nor the damage ascertained, nor the damage allowance made until after the entry of the goods, the damage allowance was unwarranted by law, and they could not give the defendants any abatement of duties on account of such damage allowance.

The court refused so to charge, and the plaintiff duly excepted.

There was a verdict for the defendants, and the judgment thereon was affirmed by the Circuit Court. The United States thereupon brought this writ, and assigns for error: 1. The defendants' evidence was improperly admitted. 2. The instruction prayed for by the plaintiff should have been given.

Mr. Assistant Attorney-General Maury for the United States.

The first legislation providing for the reduction of duties in consequence of damage to merchandise sustained during the voyage of importation is sect. 52 of the act of March 2, 1799, c. 22. In so far as it relates to this subject, it is, with an immaterial omission, re-enacted in sect. 2927 of the Revised Statutes, which is in these words: —

"In respect to articles that have been damaged during the voyage, whether subject to a duty *ad valorem*, or chargeable with a specific duty, either by number, weight, or measure, the appraisers shall ascertain and certify to what rate or percentage the merchandise is damaged, and the rate of percentage of damage so ascertained and certified shall be deducted from the original amount subject to a duty *ad valorem*, or from the actual or original number, weight, or measure on which specific duties would have been computed. No allowance, however, for the damage on any merchandise that has been entered and on which the duties have been paid or secured to be paid, and for which a permit has been granted to the owner or consignee thereof, and which may, on examining the same, prove to be damaged, shall be made, unless proof to ascertain said dam-

age shall be lodged in the custom-house of the port where such merchandise has been landed within ten days after the landing of such merchandise."

As to the importation in this case, the application for damage allowance was made within ten days after entry, and there is scarcely room for doubt, that if there had been no other legislation on the subject the refund would have been entirely legal.

The difficulty in the case grows out of sect. 21 of the act of March 1, 1823, c. 21, re-enacted (saving an immaterial omission) in sect. 2928 of the Revised Statutes, which is in these words: —

"Before any merchandise which may be taken from any wreck shall be admitted to an entry the same shall be appraised; and the same proceedings shall be ordered and executed in all cases where a reduction of duties shall be claimed on account of damage which any merchandise shall have sustained in the course of the voyage; and in all cases where the owner, importer, consignee, or agent shall be dissatisfied with such appraisement, he shall be entitled to the privileges of appeal, as provided for in this title."

These provisions, as parts of two independent statutes, came before this court in 1866 in *Shelton* v. *The Collector*, 5 Wall. 113, upon the contention by the government that the act of 1823, in requiring that "*the same proceedings*" shall be taken in case of reduction of duties on account of damage sustained during the voyage, rendered it imperative that the appraisal necessary in every such case should be made *before entry*, as in the case of importation of merchandise taken from a wreck; and this court sustained that view, holding that the act of 1823 had wrought an implied repeal of the act of 1799 in this particular.

It is true that the failure to make claim and proof for damage allowance within ten days after the landing of the merchandise was fatal to the claim in that case, but the judgment was placed distinctly *on both grounds*.

The court declined hearing *Mr. Charles M. Da Costa* for the defendants in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Section 2928 of the Revised Statutes, a re-enactment of sect. 21 of the act of March 1, 1823, c. 21, relates alone to merchandise taken from a wreck, and does not in any manner affect the proceedings under sect. 2927, a re-enactment of sect. 52 of the act of March 2, 1799, c. 22, to obtain an appraisement for an abatement of duties on account of damages to goods during the voyage of importation. What was said in *Shelton* v. *The Collector*, 5 Wall. 113, 118, to the contrary of this is disapproved. The subject is so fully and carefully considered in the opinion of the court below, that we deem it unnecessary to do more than to refer to the report of the case in 20 Blatchf. 129.

Judgment affirmed.

TREDWAY v. SANGER.

The indorsee of "a promissory note negotiable by the law merchant," which the maker secured by a mortgage of land to the payee, is not precluded from maintaining a foreclosure suit in a court of the United States by the fact that the maker and the payee are citizens of the same State.

APPEAL from the Circuit Court of the United States for the District of California.

Tredway and Kettelman, citizens of California, having made two negotiable promissory notes to McLaughlin, a citizen of that State, executed, to secure the payment of them, to him a mortgage upon lands there situate. The notes were assigned to Sanger, a citizen of Pennsylvania, who filed in the court below his bill of foreclosure against Tredway and Kettelman. They set up by plea that the assignment of the notes was merely colorable, in order to give that court jurisdiction. The court found that the plea was untrue and insufficient. A decree was rendered in favor of the complainant, reciting that there was due to him the amount of the note, ordering a sale of the mortgaged premises to satisfy the same, and providing that if the proceeds of the sale be insufficient to pay the debt, interest, and

costs, that "the clerk should docket a judgment for the amount of such deficiency," and execution be issued against the defendants therefor. They thereupon appealed.

Mr. A. Chester for the appellants.

It appears by the record that the appellants and McLaughlin are citizens of the same State. The foreclosure of a mortgage, to use the language of this court in *Sheldon* v. *Sill*, 8 How. 441, "is the pursuit by action of one debt in two instruments or securities, — the one general, the other special." The act of March 3, 1875, c. 137, upon which the appellee relies, relates solely to an action to recover the contents of a negotiable security, whereas this suit is brought to sell the land and foreclose the mortgagors' equity of redemption. A mortgage is a chose in action; and where the parties to it are citizens of the same State, an assignee is not entitled to maintain suit thereon in a court of the United States.

Mr. Henry Beard and *Mr. Charles H. Armes* for the appellee.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

There is but a single question presented by this appeal, to wit, whether, if a promissory note, negotiable by the law merchant, is made by a citizen of one State to a citizen of the same State, and secured by a mortgage from the maker to the payee, an indorsee of the note can, since the act of March 3, 1875, c. 137, sue in the courts of the United States to foreclose the mortgage, and obtain a sale of the mortgaged property.

It was held in *Sheldon* v. *Sill*, 8 How. 441, that such a suit could not be maintained under the eleventh section of the Judiciary Act of 1789, because in equity the mortgage was but an incident of the debt, and as the indorsee could not sue on the note, he could not sue to enforce the mortgage. The language of Mr. Justice Grier, speaking for the court in that case, is this: "The complainant in this case is the purchaser and assignee of a sum of money, a debt, a chose in action, not of a tract of land. He seeks to recover by this action a debt assigned to him. He is, therefore, the 'assignee of a chose in action,' within the letter and spirit of the act of Congress

under consideration, and cannot support this action in the Circuit Court of the United States, where his assignor could not." p. 450. This clearly implies that if a suit could be brought on the note, it could for the foreclosure of the mortgage, should there be no other objection to the jurisdiction than the citizenship of the payee and maker.

In the Judiciary Act of 1789 it was expressly provided that the Circuit Courts could not take cognizance of a suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the contents, if no assignment had been made, except in cases of foreign bills of exchange. The act of 1875, however, removes this restriction in suits on "promissory notes negotiable by the law merchant;" and now the jurisdiction in such suits is made to depend on the citizenship of the parties, as in other cases.

Since, therefore, the indorsee could have sued in the Circuit Court on the note now in question, it follows that, as there is no objection to the jurisdiction other than the citizenship of the original payee, the suit to foreclose the mortgage was properly brought.

Decree affirmed.

OIL COMPANY v. VAN ETTEN.

1. Unless objected to within a reasonable time, — and what constitutes such a reasonable time is a question of law, — an account rendered becomes an account stated, and cannot be impeached except for fraud or mistake.
2. A witness was, on cross-examination, asked if he had not stated to different parties that he wished the plaintiffs to recover, as he would then get his pay. An objection to the question was made, and the defendant's counsel then declared that he did not propose to impeach the witness. *Held*, that the objection was properly sustained.
3. A. made a contract with B. to deliver a specified number of matched barrel-headings, to be properly piled on the land of B., who was to furnish a man to count them, as they were from time to time piled, in order to obtain an approximate estimate of the quantity piled, and thus to determine the amount of advances to A. under his contract; but the inspection and final count was to be made by an inspector appointed by B. at a point to which the latter shipped them. The property in the headings was to pass to B. on the delivery of them on his land. In a suit to recover the contract price of

them, — *Held*, 1. That no error was committed by the trial court in admitting evidence of the counts by both parties of the whole number of single pieces of heading, and submitting to the jury the comparison between them, the court having ruled that the inspector's final count, which formed the basis of an estimate and average from which the number of matched headings was deduced, was, if made fairly and in the exercise of his best judgment, binding on the parties, unless its variance from the actual truth was too great to be accounted for by mere error of judgment in the matter of matching. 2. That although there was no evidence to show that all the pieces of heading shipped were in fact delivered at the point to which they had been sent, the jury were not bound to assume a loss in transportation in order to account for the discrepancy between the two counts.

ERROR to the Circuit Court of the United States for the Eastern District of Michigan.

The case is stated in the opinion of the court.

Mr. Levi T. Griffin and *Mr. Don M. Dickinson* for the plaintiff in error.

Mr. Harrison Geer and *Mr. Walter H. Smith*, with whom was *Mr. Michael E. Crofoot*, for the defendant in error.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This action was originally brought in the State Circuit Court for the County of Genessee, in Michigan, and removed by the plaintiff in error, who was defendant below, into the Circuit Court of the United States for the Eastern District of Michigan. The defendant in error sued as assignee of Merritt & Helme, partners as J. J. Merritt & Co., who were assignees of J. J. Merritt, upon a certain contract entered into between him and the Standard Oil Company, and subsequent modifications thereof, to recover a balance alleged to be due thereon on account of the price of certain headings for oil-barrels sold and delivered in pursuance thereof.

By the original contract, dated Oct. 4, 1873, Merritt, described as of Lapeer, Michigan, sold the Standard Oil Company two million heading suitable for oil-barrels, to be sawed twenty-two inches in length, full one inch thick on sap, and full one-half inch thick on the heart edge, and whenever more than two pieces are required to make a head the same shall be counted as two; to be delivered on board the cars at Cleveland, Ohio, on or before March 1, 1875, subject to the count and inspection of the Standard Oil Company, who agreed to receive

and pay for the same as fast as inspected at the price of forty dollars per thousand. Merritt also agreed that full one-half of the whole amount of the heading should saw full two-pieced heading, and the Standard Oil Company agreed in that case, and if the other half were not more than three-pieced heading, they would pay an additional dollar per thousand on the whole amount. It was further agreed that Merritt should have the privilege of drawing, on sight drafts, for twenty-five dollars per thousand, through the bank, accompanied by duplicate bill of lading signed by the railroad company, as evidence of shipment, and that the cars should be so loaded as to have a net value in Cleveland of amount of draft after culling and paying freight.

This contract was modified by a supplemental agreement of April 1, 1874, Helme then becoming a party to it, by which it was stipulated that Merritt & Co. should make and deliver the heading, properly piled on land in Lapeer controlled by the Standard Oil Company; the latter to furnish a man to count the heading as nearly as might be from week to week as piled, but not to inspect it, the object of the count being to obtain an approximate estimate of the heading thus piled, in order to determine from time to time the amount of advances to be made thereon; but thereupon the delivery of the heading so counted should be deemed complete, and the heading should then become the property of the Standard Oil Company absolutely, Merritt & Co. being entitled to draw upon certificates of such counts at the rate of twenty dollars per thousand, on which advances the Oil Company were to be allowed interest at the rate of ten per cent per annum until the heading should be received at Cleveland, and also to charge the cost of insurance thereon to the amount of twenty-one dollars per thousand, the loss by fire, if any, above that amount to be borne by Merritt & Co. In all other respects the terms of the original contract were to govern.

On May 29, 1874, another modification of the contract was made, which recited that, "through an error made by the inspector employed by said Standard Oil Company, the said J. J. Merritt & Co. have received from the said Standard Oil Company money in excess of the amount" which under the contract they were entitled to receive, amounting to about $2,500,

and made certain provisions as to the time and mode in which it should be refunded, but otherwise left the contract unchanged.

On Aug. 24, 1874, a further modification was agreed to, increasing the amount of the advances to twenty-five dollars per thousand on the second million of the heading.

The heading was manufactured mostly in 1874, and was piled on each side of the railroad track, upon land leased for that purpose by the defendant below, and shipments begun in May, 1875.

Testimony on the part of the plaintiff below was offered and admitted to show that in loading an accurate account was made and kept of each car loaded, of the number of the car, the line to which it belonged, and the number of pieces in each car, and that there were 391 car-loads, containing in all 2,691,660 single pieces.

After the first four car-loads had been shipped through by rail, an arrangement was made between the parties by which the rest of the heading was to be sent by rail from Lapeer to Detroit, a distance of sixty miles, and thence by vessel to Cleveland. These first four car-loads by rail and the first cargo by vessel were counted and inspected by the defendant below at Cleveland, and returns of the result made to Merritt & Co. These returns showed the number of matched headings and the number of single pieces rejected, on inspection, as deficient in size and quality, called "culls;" and it appearing that these were but a small portion of the whole, it was then agreed that if Merritt & Co. would cull before shipment as closely as they had done in these shipments, the defendant would not cull any more at Cleveland, but would merely match and count the matched heads.

Evidence was offered on the part of the plaintiff below, and admitted, to prove that the subsequent deliveries were equal on an average with these shipments as to quality and size; and that, calculating the entire quantity by this comparison, it would show a delivery of 263,303 matched headings, more than had been accounted for, which, at forty dollars per thousand, amounted to $10,532.12.

It was in evidence, on the part of defendant below, that

on the receipt of the heading at Cleveland it was inspected by their inspector. This inspector being called as a witness, testified that he actually matched the whole of the first cargo as it was counted and inspected, but the rest by only averaging from samples; that is, he laid off and piled up a thousand pieces, and arrived at the matching by seeing how many pieces it took to make the number of inches, and made an average from that. The whole number of pieces, as taken by the teamsters, were reported to him, of which he made a record, and then reduced it to matched heading, which he reported to the company. The number of single pieces, in gross, was 2,296,160, making of matched heading 1,958,539 pieces. This, he said, was the usual mode of counting and matching.

It was admitted, on the part of the defendant below, that, in going carefully over the inspector's calculations, errors had been discovered in computation, twenty-five in number, some in favor of and some against the company, and resulting in a balance of $144.34 against them, for which they admitted their liability.

On the basis of the count of their inspector, the Standard Oil Company rendered to Merritt & Co. an account, dated Aug. 20, 1875, showing a credit balance of $542.54. That balance was paid and accepted, and no objection made to the statement of the account until the bringing of this suit, Jan. 10, 1876. One car-load of heading was shipped after the close of that account, and was accounted for Sept. 25, 1875.

There was other evidence, on each side, which, it was claimed, tended to establish the accuracy of the counts, respectively, made at Lapeer and at Cleveland. There was no evidence bearing upon the question of any loss of heading between Detroit and Cleveland; but it did appear in evidence that when the heading was loaded in Detroit, upon vessels, bills of lading were made and delivered to the captains of the boats, showing the number of car-loads of heading on each vessel, which bills of lading were, upon the arrival of the vessels in Cleveland, delivered to the defendant below, at its office, when freight was paid thereon and charged to Merritt & Co., the bills of lading being retained by the Standard Oil Company. There was no evidence tending to impeach the good faith of

the count on either side, or that the inspector of the defendant below was not a competent person for the business intrusted to him.

The court charged the jury, in substance, that, by the terms of the contract, as modified on April 1, 1874, the heading became the property of the Standard Oil Company on delivery at Lapeer on land leased by it, but subject to their inspection and count at Cleveland; that, if that count was made fairly and in the exercise of the best judgment of the inspector, it would be binding on the plaintiff, unless its variance from the actual truth was too great to be accounted for by any error of judgment, in which case the plaintiff was not precluded from showing a mistake; that, if upon all the evidence the jury should be unable to determine whether there was fraud or mistake in the count upon either side, or if upon being satisfied that there had been fraud or mistake they were unable to determine which party is responsible for it, they must find for the defendant, except as to the small amount admitted to be due. And the jury was also instructed that the count and inspection, so far as they involved the culling or rejection of defective pieces and matching, so as to determine how many single pieces were required to make a matched heading, according to the contract, were matters of judgment on the part of the inspector, which, if honestly exercised, would be binding; and that, consequently, the proof of mistake, upon the case, as it arose upon the evidence, was confined to the count of the whole number of single pieces, and the consequent error, if such were proved, as to the number of matched headings; although the defendant company was not bound by the contract to make a gross count to determine the whole number of single pieces, or to keep any memorandum or estimate of any such gross count, or to make return thereof to Merritt & Co., its duty being performed if it handled all the heading delivered to it and honestly and correctly counted it in such a way as to determine the number of complete heads.

As to the account stated and rendered, the court charged the jury, in effect, that, the account having been rendered in September, 1875, and no objection having been made until January, 1876, by the bringing of the suit, it had been kept such a

time as made it an admission on the part of Merritt & Co. of its correctness, but that the plaintiff was not estopped from showing fraud or mistake in it, which, however, should be made clearly to appear, the burden of proof resting upon the plaintiff to establish it.

Various exceptions were duly taken to the rulings of the court, in the admission of evidence, in refusing to instruct the jury as requested, and to the charge as given, which, so far as necessary, will be referred to in their order. A verdict was returned in favor of the plaintiff below for $7,688, and judgment rendered thereon, which the defendant below now brings into review upon this writ of error.

1. It is objected by the plaintiff in error, in the first place, that the court erred in admitting evidence as to the counts by both parties of the whole number of single pieces of heading, and submitting to the jury the comparison between them, as furnishing any means of establishing error in the count of matched headings.

It is argued that the count of gross pieces was not recognized by the contract, as it contemplated only a count of matched headings; and that as this involved culling the bad from the good, and the matching of single pieces to constitute the heading required by the contract, and then only a count of the number of the latter, the process involved, at least in two of its steps, the exercise of skill and judgment, and made it necessary, if mistake was relied on, to show directly that it had occurred in the actual count of matched headings.

But, as we have already stated, the culling had been dispensed with after the first four cargoes; and the matching, as testified to by the inspector, was made upon an estimate based upon a few experiments, according to which, upon an average, the whole number of single pieces was reduced to matched headings. It did become necessary, therefore, for the inspector to make a count of the single pieces, as the means of arriving at the number of matched headings. It was also contemplated by the contract that a count of single pieces should be made at Lapeer, by a counter, also appointed by the defendant below, for the purpose of determining the amount of advances to which Merritt & Co. were entitled; and although this count was not

the final and conclusive one, it was quite legitimate to use it in comparison with that made at Cleveland, as one mode of testing the accuracy of the latter. And this comparison was justified by the evidence, also objected to, that in those particulars which might affect the ratio of single pieces to matched headings, such as size, quality, &c., the early cargoes, in respect to which that ratio had been determined by actual inspection and count, averaged no better than all subsequent deliveries. It furnished to the jury, quite fairly and consistently with the intent of the parties to the contract, a means of determining whether there had not been a mistake in the last count, properly limited by the court in the rule, that the discrepancy must be so great as that it could not reasonably be accounted for by any mere variation of judgment in the matter of matching.

It is admitted by counsel for plaintiff in error, and such undoubtedly is the law, that the count of the inspector at Cleveland was subject to impeachment for fraud or mistake; the mistake being not a mere alleged error of judgment, but one of fact, which prevented the proper exercise of his judgment. Such was the character of the mistake to which the evidence was directed; namely, a mistake in counting the number of single pieces, which formed the basis of an estimate and average from which the number of matched headings was deduced. The objection seems to be directed to the mode of proof, it being insisted that it should be direct evidence of the fact of a mistake, independent of the evidence of its amount. But we are not aware of any rule of law which requires any particular method of proving such a fact, differing from that required to prove any similar fact. Whatever naturally and logically tends to establish it is competent evidence. If a stranger had stood by at Cleveland, and, following the inspector in his count of single pieces, had detected him in error, which would necessarily affect the final count of matched headings, he would thereby have been a competent witness to prove the discrepancy. Proof of a similar count at Lapeer would differ only in degree, and not in quality, as evidence to the same effect.

It is suggested, however, in reply to this, that in the latter case an indispensable link in the chain necessary to connect

the count at Lapeer with that at Cleveland is wanting, because it is admitted that there was no evidence to show that all the pieces of heading shipped at Lapeer were, in fact, delivered at Cleveland, and, for aught that appears, the quantity of the apparent difference may have been lost in transportation between the two places. But whether this was so probable, as to more reasonably account for the discrepancy, than the supposition of an error, in one or both counts, was a matter for the consideration of the jury. They were not bound to assume a loss in transportation in the absence of any evidence on the subject, and were entitled to assume that the shipments arrived at their destination undiminished, in the absence of any reason to the contrary, especially in view of the fact that there had been no complaint from any quarter, that the number of car-loads called for by the bills of lading was not verified, or that more freight had been charged and paid than would be due if there had been a deficiency.

But independent of this, and on the assumption that the whole amount of the discrepancy between the two counts could be accounted for by an actual loss in transportation, the case of the defendant below would not have been strengthened. Although the count was to be of matched headings, and at Cleveland, and conclusive in the absence of fraud or mistake, nevertheless, by the modified contract of April 1, 1874, the delivery of the heading took place at Lapeer, so as to pass the property in the heading absolutely to the Standard Oil Company. And as the risk follows the title, any loss that subsequently accrued, by non-delivery on the part of the carriers, would be the loss of the defendant below, and the plaintiff would be entitled to recover the contract price on proof of the quantity of single pieces reduced to matched headings, delivered at Lapeer, upon the best evidence that could be adduced under such circumstances, although they could not be actually counted and matched at Cleveland, as required by the terms of the contract.

2. It is next objected by the plaintiff in error that the court below erred in its rulings upon the account offered and admitted in evidence, and which, it was claimed, was a stated account. The claim on this part of the case is, that an account rendered

becomes an account stated, unless objected to within a reasonable time; that what constitutes a reasonable time in such a case is a question of law; and that an account stated cannot be impeached except for fraud or mistake; and in support of these propositions counsel cite *Perkins* v. *Hart*, 11 Wheat. 237; *Toland* v. *Sprague*, 12 Pet. 300; *Wiggins* v. *Burkham*, 10 Wall. 129; *Lockwood* v. *Thorne*, 11 N. Y. 170; and other cases.

There is no dispute but that this is a correct statement of the law, and it is precisely what was charged by the Circuit Court, and in the very language of instructions asked for by the plaintiff in error. The court followed it up by adding also that the lapse of time from September, 1875, when the account was rendered, to January, 1876, when the suit was begun, without objection, converted it into a stated account, which could be impeached only for fraud or mistake.

But the same evidence which sufficed to establish a mistake in the count at Cleveland on the part of the inspector, also impeached the account, for it was founded on that count and embodied its mistake.

3. It is further alleged as error that the court refused to instruct the jury, as requested by plaintiff in error, that "this cause is based upon the ground of either fraud or mistake, and there is no evidence of any kind, except the two counts," referring to the number of headings delivered, "and if the jury find a verdict for the plaintiff, they must find a verdict for the entire amount. Either the defendant is liable for this entire amount or it is not liable, except for the small sum admitted." This request was very properly denied by the court. There is no rule of law that limits, in such a manner, the discretion of the jury in dealing with the evidence on a question of damages in such a case. The very spirit of trial by jury is, that the experience, practical knowledge of affairs, and common sense of jurors, may be appealed to, to mediate the inconsistencies of the evidence, and reconcile the extravagances of opposing theories of the parties. There was nothing illogical in the present case, in the verdict of the jury, proceeding upon the supposition of possible errors in both counts, and making probable allowances for their amount, although no mathematical calculation could be made to demonstrate the exact accuracy of the result.

But even if the ruling was erroneous as alleged, it is difficult to understand how it could have prejudiced the plaintiff in error. The argument presupposes that the evidence justified a verdict for the larger amount, and establishes merely that it was for less than it might properly have been. Whatever error was committed in this respect, was certainly not to the prejudice of the party complaining.

One of the witnesses for the plaintiff below, on cross-examination, was asked this question: —

"Have you not recently stated to different parties, in talking about the matter, that you wanted them to recover here, because you would then get your pay?"

The plaintiff's counsel objected to the question on the ground that it did not specify time and place, to which suggestion defendant's counsel replied that he did not propose to impeach the witness; whereupon the court sustained the objection, and to that ruling an exception was taken.

There is no error in this. If the object was to impeach the witness by subsequent contradiction, the question was clearly incompetent, as too indefinite. If the design was to impeach the witness in another mode, as by showing interest or bias, supposing it to have been competent for such purpose, as to which we express no opinion, it was the duty of counsel to have accompanied his disclaimer with that qualification. He must be taken, without such explanation, to have waived the objection. The disclaimer, in its general form, was broad enough to cover every form of impeaching the credit of the witness, and it cannot be narrowed now without injustice. We have considered all the exceptions of the plaintiff in error, and find no error in the record.

Judgment affirmed.

MISSIONARY SOCIETY v. DALLES.

1. Under the act of Aug. 14, 1848, c. 177, entitled "An Act to establish the territorial government of Oregon," a religious society acquired no title to public lands by reason of its occupation of them as a missionary station among the Indian tribes, unless such occupation actually existed at that date.
2. Where, therefore, a religious society appropriated certain lands in the Territory of Oregon, erected improvements thereon and occupied them for such a missionary station, but its occupation ceased before that date, and a portion of them, after the town-site acts took effect, was, pursuant to their provisions, entered and paid for, and another portion was claimed by a party who had fully complied with the requirements of the act of Sept. 27, 1850, c. 76, commonly called the Donation Act, — *Held*, that the society to which by reason of such occupation a patent had been issued held the title to such portions in trust for the parties claiming respectively under the donation and the town-site acts.
3. Prior to the said act of Sept. 27, 1850, no person could, by entry or preemption settlement, acquire as against the United States any right or title to public land in Oregon. *Stark* v. *Starrs*, 6 Wall. 402, cited upon this point and approved.

APPEAL from the Circuit Court of the United States for the District of Oregon.

This was a bill in equity filed by Dalles City, against the Missionary Society of the Methodist Episcopal Church.

The following facts are disclosed by the pleadings and evidence: The complainant was incorporated by an act of the legislature of Oregon passed Jan. 26, 1857, which was amended by an act passed Jan. 20, 1859. By the last-named act the boundaries of the city were established. A large portion of the land within them was, in the year 1852, settled upon and occupied, not for agricultural uses, but as a town site for the purposes of business and trade, and it has been so occupied ever since. During the year 1855 the lawfully constituted authorities of the county, within which the city was situate, caused the land so occupied to be surveyed and platted into lots, blocks, streets, and alleys, and the plat thereof to be recorded in the recorder's office of the county. A survey made by the United States of the land was approved Feb. 4, 1860, and the corporate authorities of the city entered, April 19, 1860, at the land-office of the United States, the land, being the fractional northwest quarter of section three, in township one, of range thirteen east, containing one hundred and twelve

acres, in trust for the several use and benefit of the occupants thereof, according to their respective interests. All this was done in pursuance of the act of July 17, 1854, c. 84, by which the provisions of the act of May 23, 1844, c. 17, were extended to the Territory of Oregon. The fractional quarter is the land occupied by the city as a town site. The corporate authorities paid therefor to the receiver of the land-office one dollar and twenty-five cents per acre, and the city claims that it thereby acquired title thereto in trust as aforesaid.

The Missionary Society of the Methodist Episcopal Church, a corporation organized under the laws of the State of New York, claims to own in fee-simple a tract of land containing six hundred and forty-three acres and thirty-seven hundredths of an acre, for which a patent bearing date July 9, 1875, was issued to it by the United States. The land described in the patent includes the fractional quarter in question.

The city, by the bill filed in this case, asserts the validity of its title to the fractional quarter, and avers that, in violation of its rights, the patent was improvidently issued to the Missionary Society. It prays for a decree, declaring it to be the owner of the fractional quarter in trust for the use and benefit of the owners and occupants thereof, and directing the defendant to convey the legal title in and to the land to the city, to be held by it in trust for the respective occupants thereof.

The remaining facts are set forth in the opinion of the court.

Upon final hearing, the Circuit Court rendered a decree in favor of the city, in accordance with the prayer of the bill. This appeal is prosecuted to reverse that decree.

Mr. E. L. Fancher for the appellant.

The record establishes beyond controversy that the Methodist Missionary Society founded a missionary station at The Dalles in 1836, and labored among the Indians there until September, 1847. The society then provided for a continued occupation of the station, for the purposes for which it had been established, by annexing to the permitted occupancy of it by the American Board of Commissioners for Foreign Missions *an express condition* that such missionary work should

be continued there as usual. In November following, Dr. Whitman, the superintendent of the station, and others were murdered, and his employés fled from the station. The Cayuse war was then waging. By reason of Indian hostilities, the society was prevented from reoccupying the station in the strict sense of having its missionaries there actually treading the soil until the spring of 1850. The United States troops, at the breaking out of that war, took possession of the mission buildings, established a post there, and reserved for military uses three hundred and fifty acres within the limits of the tract claimed and surveyed by the Missionary Society. Congress, by an act passed in June, 1860, indemnified the society for the land thus taken. The remainder which is now in controversy is therefore claimed under a title which Congress recognized to be valid. There were no rival claimants until after the land had been surveyed, and the survey filed in the proper office. It is submitted, —

1. There having been an actual and uninterrupted possession of the land for missionary purposes from 1836, until the compulsory cesser of occupation by reason of Indian hostilities, there was, in the absence of any adverse possession or claim, an occupation of the land within the meaning of the confirmatory act of 1848. The title of the society drew to it the possession, although at the date of the act there was not an actual *pedis possessio*.

2. The society, if it acquired a right to the lands, was entitled to a patent therefor. It was the province of the Land Department to determine whether the facts which authorized the issue of the patent existed, and its finding on that question is conclusive. *Quinby* v. *Conlan*, 104 U. S. 420.

Mr. John H. Mitchell and *Mr. James K. Kelly* for the appellee.

MR. JUSTICE WOODS delivered the opinion of the court.

It is clear, and does not seem to be disputed, that the title of the appellee to the fractional quarter of land described in the bill is good and valid against all the world except the appellant, the Missionary Society of the Methodist Episcopal Church. It was acquired by virtue of an entry made at the

proper land-office, in pursuance of the provisions of the act of May 23, 1844, c. 17, and the act of July 17, 1854, c. 84. The controversy arises upon the claim of the appellant, which contends that its title is better and superior to that of the appellee.

The patent from the United States to the appellant for the land was issued by virtue of sect. 2447 of the Revised Statutes, and, as directed by that section, declares as follows: "That this patent shall only operate as a relinquishment of title on the part of the United States, and shall in no manner interfere with any valid adverse right to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claimants to the same land."

It is, therefore, clear that the patent does not conclude this controversy, and that if the United States had, at the date of the patent, no title to the lands described therein, the patent conveyed none. But both parties contend that they acquired the title of the United States long before the date of the patent. As the appellee is conceded to have *prima facie* a good title, the appellant is driven to show a better title, independently of the patent. This it has undertaken to do. The only question in the case, therefore, is, has it succeeded in establishing a title to the premises superior to that under which the appellee claims, and by virtue of which it is in possession.

The appellant asserts title under the provisions of the first section of the act of Aug. 14, 1848, c. 177, entitled "An Act to establish the territorial government of Oregon," which, among other things, declares: "That the title to the land, not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in said Territory, together with the improvements thereon, be confirmed and established in the several religious societies to which said missionary stations respectively belong." The appellant contends that on that date it was, within the meaning of the statute, occupying the land now in dispute as a missionary station among the Indian tribes of Oregon. Whether this contention is well founded is the turning-point of the controversy.

It appears from the testimony in the record that in the

year 1836 or 1837 a missionary station was established by the Missionary Society of the Methodist Episcopal Church, under the superintendence of Rev. Jason Lee, on the land now in controversy, situate on the Columbia River, east of the Cascade Mountains, at a place then called Wascopum, but since then known as The Dalles. In 1844 Lee was succeeded by Rev. George Gary, who continued to be the superintendent of the station until July, 1847, when he was succeeded by Rev. William Roberts. At this time there were at the station a two-story dwelling-house, a school-house, which was used also as a church, a store-house with cellar underneath, a barn, some farming land enclosed, and farming utensils.

In August, 1847, Mr. Roberts, being still the superintendent of the station, transferred it to Dr. M. Whitman, a missionary of the society known as the American Board of Commissioners for Foreign Missions. An account of this transfer is given in the testimony of Mr. Roberts, as follows: —

"In August, 1847, I transferred the said station into the hands of Dr. M. Whitman at the assent of the A. B. C. F. M. The mission station was placed in his hands on the conditions and with the understanding that it should be occupied by them for the use and benefit of the Indians residing in that place and vicinity. For the movable property they were to pay such an amount as might mutually be agreed upon. For the station itself they were to give no compensation, the understanding being all the while that the mission was to be maintained by them for the use and benefit of the Indians in a religious point of view, which included the education of the children, the instruction of the Indian parents in all matters pertaining to their religious interests and temporal well-being. The reasons for the transfer without compensation were briefly these: The Methodist mission had but one station east of the Cascades and more work in the Willamette than they could well attend to. The American Board had three stations in the upper country, and it was quite desirable for them to have The Dalles also, as it was the key to that entire region, and as an act of Christian regard and confidence the transfer was thus made.

"The amount which Dr. Whitman was to pay for the mov-

able property was subsequently fixed at a fraction over six hundred dollars. This included a large canoe, farming utensils, fanning-mill, some wheat," &c.

Payment of the $600 was made by a draft drawn by Dr. Whitman, dated in September, 1847, upon the American Board.

Mr. Roberts, Rev. Alvin F. Waller, and Mr. Brewer, the latter two, up to the date of the transfer, having been in the occupancy of the mission, left the station immediately after the transfer and went down the Columbia River. They carried off their movable property which had not been sold to Dr. Whitman. Dr. Whitman, to whom the station had been transferred, remained there a few days and then returned to his home at Wailatpu, distant about one hundred and forty miles. He left his nephew, Perrin B. Whitman, a youth seventeen years of age, at The Dalles in possession of the buildings which had been occupied by the Methodist missionaries. On Nov. 29, 1847, Dr. Whitman was, with his family and a number of other persons, murdered by the Cayuse Indians at his home at Wailatpu. When news of this massacre reached Perrin B. Whitman, he abandoned The Dalles and went down the Columbia River, leaving no one in the occupancy of the station.

After the transfer of the station by Roberts to Whitman in August, 1847, the record does not show that any missionary labors were ever performed at The Dalles, either by the Methodist Society or the American Board, except two or three religious services held by Mr. Waller in June, 1850, when he went to The Dalles to show Mr. Roberts the boundaries of the mission claim. After the month of August, 1847, no person representing the Methodist Missionary Society, and after December, 1847, no person representing the American Board, ever occupied the missionary station at The Dalles.

The reason assigned by the appellant why the American Board abandoned the station and why possession of it was not resumed by the Methodist Society was the fear of Indian hostilities.

It follows that on Aug. 14, 1848, when the act to organize the Territory of Oregon was passed, the station was not in the occupancy of any one representing either of the missionary societies.

About the last of February or the first of March, 1849, Messrs. Walker, Spaulding, and Eels, three missionaries of the American Board, delivered a writing to Mr. Roberts, in which they "offered for his acceptance the mission station at Wascopum, near the Grand Dalles of the Columbia River," and proposed "that it be retransferred to the Oregon Mission of the Methodist Episcopal Church in the same manner in which it was received by the Oregon Mission of the American Board of Commissioners for Foreign Missions." The draft given to Mr. Roberts for the movable property at the Dalles, sold by him to Dr. Whitman in August, 1847, was delivered up, it having never been paid.

The appellant did not resume missionary work at The Dalles after this attempt to retransfer, nor did it take possession of the premises.

In June, 1850, Mr. Roberts returned to The Dalles for the purpose of making a survey of the six hundred and forty acres which he proposed to claim for the Missionary Society of the Methodist Episcopal Church under the act of 1848. He made a survey and had it recorded.

On Feb. 28, 1859, several years after the lands in controversy had been entered and paid for by Dalles City, the American Board delivered to the Missionary Society of the Methodist Episcopal Church a release of all their right and title to "the property in the vicinity of The Dalles on the Columbia River, known as the 'mission property.'"

The question is presented whether, upon these facts, the appellant, the Missionary Society of the Methodist Episcopal Church, has shown a better title to the lands in controversy than that of Dalles City, the appellee.

The title claimed by the appellant is based entirely upon the first section of the act of Aug. 14, 1848, before referred to. This was a public grant. In *Dubuque & Pacific Railroad Co.* v. *Litchfield*, 23 How. 66, it was said by this court, speaking of a public grant of land: "All grants of this description are strictly construed against the grantees. Nothing passes but what is conveyed in clear and explicit language." See also *Jackson* v. *Lamphire*, 3 Pet. 280; *Beaty* v. *Lessee of Knowler*, 4 id. 152; *Providence Bank* v. *Billings*, id. 514;

Charles River Bridge v. *Warren Bridge*, 11 id. 420; *Leavenworth, &c. Railroad Co.* v. *United States*, 92 U. S. 733.

The act of Aug. 14, 1848, confirms and establishes title to land occupied at the date of the act as missionary stations among the Indian tribes. The words are "now occupied." To occupy means to hold in possession; to hold or keep for use; as to occupy an apartment. Webster's Dictionary. The appellant contends that this act confers title on it for lands which it did not occupy at the date of the act, but which it had voluntarily abandoned eleven months before, and the occupancy of which it never resumed, either for missionary or any other purposes. Not even a liberal construction would support such a claim.

But the appellant, conceding that it was not in the actual occupancy of the premises, either as a missionary station or otherwise, at the date of the passage of the act, nevertheless insists that, being in actual occupancy in August, 1847, it transferred its rights therein to the American Board, on condition that the latter society should maintain a mission there for the benefit of the Indians, and that, as the American Board failed to maintain such a mission and abandoned the premises, the rights of the appellant reverted to it, and it, therefore, had a constructive possession when the act of Aug. 14, 1848, was passed, which brought it within the meaning of the act.

We do not think this contention can be sustained. In the first place, it cannot be fairly inferred from the testimony in the record that the transfer of the missionary station was a conditional one, and that it was any part of the contract that the rights of the appellant should revert to it if the condition were broken. It is plain that the transfer was absolute. Doubtless it was the expectation of the appellant that the transferee would conduct upon the premises a mission for the religious benefit of the Indians, and such doubtless was the purpose of the American Board. But it does not appear to have been any part of the contract that, if the American Board failed to carry on such a mission, the appellant should resume possession.

But conceding that such was the understanding between the

parties, there is still a fatal obstacle to any claim on the part of the appellant. When the appellant was in the occupancy of the premises in controversy, and when it made the transfer of possession in August, 1847, and until the passage of the said act of Aug. 14, 1848, that part of the country was without an organized territorial government under the laws of the United States. The public domain included within the Territory of Oregon by the act just mentioned had not then been surveyed, nor was it open to settlement, pre-emption, or entry. *Stark* v. *Starrs*, 6 Wall. 402. The title was in the United States, subject to the possessory Indian title to portions of the Territory, and there was no law by which any person or company could acquire title from the government. All persons, therefore, who settled upon the public lands acquired no rights thereby as against the government. They were merely tenants by sufferance. The most they could claim was the right of actual occupancy as against other settlers. Such an occupant could yield his right of actual possession to another settler, but he could convey no other interest in the land. If he abandoned the land and another settler occupied it, the former lost all right to the possession. If he transferred the possession to another and the transferee abandoned the land, the first possessor could claim no right in the land unless he again took actual possession. In short, the settler had no right as against the government, and no rights under the laws of the United States as against any one else to the possession of the land in his actual occupancy, except and only so long as such occupancy continued.

It is true that before the passage of the act of Aug. 14, 1848, to organize a territorial government for Oregon, the people of that Territory had, in June and July, 1845, met by their delegates in convention and adopted laws and regulations for their government "until such time," as they declared, "as the United States of America extend jurisdiction over us." In this plan of government it was provided that any one wishing to establish a claim to land should designate the extent of his claim by line marks, and have it recorded in the office of the territorial recorder. The appellant cannot derive any title from this regulation, for it never defined the extent of its claim

by boundaries and never recorded the same, as required by the regulation, until long after the passage of that act, the fourteenth section of which declares as follows: "All laws heretofore passed in said Territory making grants of land, or otherwise affecting or incumbering the title to lands, shall be, and are hereby declared to be, null and void."

Referring to this act, this court declared in *Lownsdale* v. *Parrish*, 21 How. 290, that Congress passed no law in any wise affecting title to lands in Oregon till the passage of the act of Sept. 27, 1850, c. 76, and that prior to that date no one could acquire any title to or interest in the public lands in that Territory.

It follows that there could be no constructive possession of the public lands. When, therefore, in August, 1847, the appellant voluntarily abandoned its possession of the lands in controversy to another missionary society, it lost every shadow of claim thereto. Its right was a mere possessory right, without other title. It had no rights which it could reserve. When the American Board, in December, 1847, abandoned the lands in controversy the appellant had no rights therein. The reasons which induced the abandonment of the lands by the missionary societies, whether a new policy on the part of the appellant or fear of the Indians on the part of the American Board, are entirely immaterial. When the lands were abandoned for any reason all right in them was lost, and they were open to the occupancy of any one who might choose to take and hold them.

The method adopted by the appellant to turn over the station to the American Board by an actual transfer of possession was as effectual as any could be. It could be done only by yielding the actual occupancy, and this could not be effected by a written transfer. It could be accomplished only by the going out of one party and the going in of the other.

If the appellant had, in August, 1847, executed the most formal deed, conveying the lands to the American Board, and had stipulated therein that on failure of the latter to maintain a mission thereon for the benefit of the Indians, or upon its abandonment of the lands, all the rights of the appellant should revert to it, and it should be entitled to resume immediate

possession, such a writing would have been inoperative and futile. The appellant had no rights in the land which it could convey, and no rights which it could reserve.

These views are supported by *Stringfellow* v. *Cain*, 99 U. S. 610, brought up from the Territory of Utah. The act of March 2, 1867, c. 177, "for the relief of the inhabitants of cities and towns upon the public lands," provides that whenever any portion of the public lands of the United States has been or shall be settled upon and occupied as a town site, and therefore not subject to entry under the agricultural preemption laws, it shall be lawful for the authorities of the town to enter the lands so settled and occupied in trust for the several use and benefit of the occupants thereof, the execution of which trust to be conducted under such rules as the legislature of the State or Territory may prescribe. Under this act, it was held in that case that where a party had been in the occupancy of a lot, but prior to the passage of the act voluntarily withdrew therefrom and gave it up to others, the rights, which depended on keeping the possession, were gone.

The appellant contends that the language of the first section of the act of Aug. 14, 1848, under which it claims, implies that it had some title to the lands in question before the act was passed. It places stress on the words "that the title to the lands be confirmed and established in the several religious societies to which said missionary stations respectively belong," and says there must have been some previous title which could be confirmed and established.

We have seen that it was not possible to acquire any title as against the United States before the passage of this act. If, therefore, the force is to be given to the words of the statute which the appellant claims for them they must refer to the possessory title under the regulations above mentioned of the provisional government. But no steps, as we have seen, were taken by appellant to establish its claim under those regulations. It had simply settled upon the public domain as a tenant by sufferance, without authority of any law or regulation of any government, and had done no act by which it could acquire any claim of title. Whatever, therefore, may have been

the case with other missionary societies, the appellant had no title of any kind which could be confirmed and established by the act. The American Board was in no better position.

Neither of the societies acquired any title under the act of 1848. The writing executed in 1849 by Messrs. Walker, Spaulding, and Eels, and the release made by the American Board to the appellant in 1859, after Dalles City had entered and paid for the land, and the patent of the United States in 1875, which was a mere release, conveyed no rights in the lands in controversy to the appellant.

The decree of the Circuit Court was, therefore, right, and must be

Affirmed.

NOTE. — *Missionary Society* v. *Kelly*. *Missionary Society* v. *Wait*.

Appeals from the Circuit Court of the United States for the District of Oregon.

These cases were submitted at the same time and by the same counsel as was the preceding case.

MR. JUSTICE WOODS delivered the opinion of the court.

These cases were in all respects similar to *Missionary Society* v. *Dalles*, *supra*, p. 836, except that the appellees claimed under a title different from that relied on by Dalles City. So far as the title of the appellant is concerned, they and that case were tried upon the same evidence. It follows, that if the appellees in these cases show an equitable title in themselves, the decree should be affirmed. This they have done. They all claim title under one Winsor D. Bigelow, whose title was derived under the act of Sept. 27, 1850, c. 76, commonly called the Donation Act. This act gave, upon certain conditions, to every white settler upon the public lands, being a citizen of the United States, above the age of eighteen years, a half section of land if he were a single man, and a whole section if he were a married man. The record clearly shows a full compliance by Bigelow with the law, and establishes his right to the lands in controversy, which he afterwards conveyed to the appellees in these cases. The decree of the Circuit Court in each of these cases, which is similar to the decree in that case, is therefore right and should be affirmed; and it is

So ordered.

CHAPMAN v. COUNTY OF DOUGLAS.

A. conveyed, March 5, 1859, to a county in Nebraska certain lands for a "poor-farm," and they were thereafter used as such. The county, pursuant to its agreement, made one cash payment, and for the remainder of the stipulated consideration gave its notes secured by mortgage, and payable respectively in one, two, three, and four years. A. assigned the notes to B. Some time thereafter, the Supreme Court of the State decided that, by the purchase of lands for such a purpose, a county could not be bound to pay at any specified time the purchase-money, or to secure it by mortgage upon them, but was limited to a payment in cash and to the levy of an annual tax to create a fund wherewith to pay the residue. A. and B., the notes remaining unpaid, filed, Sept. 10, 1877, a bill praying for a reconveyance and an accounting, or, should the county elect to retain the lands, then for a decree for the value of them. *Held*, 1. That in view of that decision, the contract being unauthorized only so far as it relates to the time and mode of paying the purchase-money, and the title to the lands having passed by the conveyance, the county holds that title as a trustee for the benefit of B., and that he is entitled to the relief prayed for. 2. That unless the sum due on account of the purchase-money, after a proper allowance shall be made as a compensation for a failure of A.'s title to a small part of the lands, be paid within a reasonable time, to be fixed by the court below, having reference to the necessity of raising the same by taxation, as prescribed and limited by the statute, the county be required to execute and deliver a deed, releasing to A. all the title acquired under his deed, and that he convey the same to B. 3. That the suit is not barred by the Statute of Limitations.

APPEAL from the Circuit Court of the United States for the District of Nebraska.

This is a bill in equity filed Sept. 10, 1877, by Chapman, a citizen of Tennessee, and the representatives of Charles A. Ely, deceased, citizens of Ohio, against the county of Douglas, a municipal corporation of Nebraska.

The object of the bill is declared to be, and the prayer corresponds to it, to compel the county to surrender possession of two certain tracts of land therein described, one of one hundred and sixty acres and one of ten acres; and to reconvey and release the title thereto, which the county acquired under a deed made by Chapman to the county on March 5, 1859; and for an account of the rents and profits thereof; or, "in case said county of Douglas and the corporate authorities thereof shall elect and request to be allowed to retain and hold the land described, then and in that case to compel said county and the corporate authorities thereof to pay to or for your ora-

tors, as the court shall direct, the reasonable price and value of said land, as stated in said deed of conveyance, with lawful interest thereon from the date of said deed to the time of the making of such payment."

It appears that on March 4, 1859, an agreement under seal was entered into between Chapman of the first part and the county of Douglas, the latter acting by the county commissioners, of the second part, whereby he agreed to sell and convey the premises in controversy "on the following conditions, to wit: That the party of the second part shall pay to the party of the first part, at the ensealing and delivery of a warrantee conveyance from the party of the first part to the party of the second part of the real estate aforesaid, two thousand dollars ($2,000) in county orders of the county of Douglas aforesaid on the treasurer of said county of Douglas, and the balance of six thousand ($6,000) dollars in four equal annual payments, together with interest on the amount due at ten (10) per cent per annum until paid; and the said party of the first part will, when required, resign to and give up the possession of said property to the party of the second part, or its assigns or agents, immediately on the payment of the first payment hereinbefore enumerated, and put the said county of Douglas or its agents in full and peaceable possession of said described property. And the said party of the second part agrees to purchase said property on the terms aforesaid of and from the party of the first part, and for the security of the deferred payments, as hereinbefore set forth, to give a mortgage upon said described property to the party of the first part."

On the next day, in pursuance of this agreement, Chapman and wife executed and delivered to the county commissioners a deed to the county of Douglas for the land, which was accepted and placed by them on record. The first instalment of the purchase-money, $2,000 in county orders, was paid at that time, when, also, the county commissioners, in the name of the county, executed and delivered to him the four promissory notes required by the agreement, payable in one, two, three, and four years from that date respectively, and a mortgage, in the usual form of a conveyance in fee, with a defeasance, to secure the payment of the same, which was accepted and recorded.

The property was purchased for the use of the county for a poor-house and farm. Possession of it was taken immediately by the county authorities, and it has been improved and used for that purpose continuously ever since. The title of Chapman as to the one hundred and sixty acre tract was perfect, but as to the ten acre tract has failed.

On Nov. 26, 1860, the notes and mortgage were assigned, for value, to Charles A. Ely, who having since deceased, his rights have devolved upon his legal representatives. On June 13, 1868, William A. Ely, a minor and the devisee of Charles A. Ely, by his next friend and guardian, commenced a suit in the District Court for Douglas County for the foreclosure of the mortgage, to which a demurrer was interposed, on the ground that the notes and mortgage were void, *ab initio*, for want of power on the part of the county to make them, and also because any action on them was barred by the Statute of Limitations. This demurrer having been sustained, the plaintiff dismissed the action on July 21, 1868, without prejudice. On Aug. 8, 1868, a similar suit, by bill in equity, was begun in the Circuit Court of the United States, which, on November 19, in the same year, was dismissed without prejudice; and, on March 15, 1869, a similar bill was filed in the same court, to which the same defences, as above stated, were raised upon a demurrer, which was sustained, and on Dec. 30, 1872, the bill was dismissed without prejudice.

The answer to the present bill admits that no part of the $5,000 of the original purchase-money has been paid, and that the rents, issues, and profits of the premises, since the county has been in possession of them, exceed the amount of the first instalment which was paid, and sets up the same defences as before, that the mortgage and notes are void for want of power on the part of the county to make them, and that any action accruing to the complainants is barred by lapse of time and the Statute of Limitations. It also admits "that both the said commissioners and the said Chapman believed that the said county had full power and authority to purchase said lands and execute the said notes and mortgage for the unpaid part of the purchase price, and that all the actings and doings of the said parties in that behalf were had, made, and done in

perfect good faith and for good and sufficient considerations, in all things conformable to equity and good conscience, save as is hereinafter stated." This saving is that "the sum paid by this defendant for said lands, to wit, $2,000, was the full, fair value thereof at the time of the said purchase and sale, and the amount of the said notes and mortgage was just so much in excess of the true value thereof. This defendant is informed and believes, and now here charges, that the said notes and mortgage were made between the said Chapman and the said commissioners, acting in the name of said county, with the full knowledge on the part of all of them that the full and fair value of the premises had been already paid therefor by the said county, and that the agreement to give the said notes and mortgage was unjust and oppressive toward the said county, and that, in fact, they were without consideration, and that the giving thereof was induced by some secret and fraudulent agreement or understanding between the said commissioners, or some of them, on the one side, and the said Chapman on the other." It also admits that during the delay of the complainants in bringing their suit "the evidences of the fraudulent, corrupt, oppressive, and unjust contract of purchase have disappeared." No evidence in support of the alleged fraud is, therefore, offered, and the defendant is constrained to rely upon the Statute of Limitations, if any cause of action ever existed. In reference to the allegation of the oppressive amount of the price agreed to be paid, in addition to the fact admitted in the answer, that the rents and profits accrued to the county since it has been in possession amounted in value to more than the payment made, it is also urged in argument by its counsel against a rescission of the contract, that "there has been such a change of circumstances that that mode of relief would be most oppressive. This land, purchased when the county was very sparsely settled, and situated very near to a town which has recently grown to great importance, must have greatly appreciated in value. Besides which fact, there is the further one already adverted to, that the county has improved it to the extent of thirty thousand dollars." It is, therefore, insisted that the county should be permitted to retain the land without paying for it.

On final hearing the bill was dismissed, and the decree, to that effect, is brought here for review by this appeal.

Mr. Charles C. Bonney and *Mr. George Willey* for the appellants.

Mr. John C. Cowin and *Mr. James M. Woolworth* for the appellee.

MR. JUSTICE MATTHEWS delivered the opinion of the court, and, after stating the case as above, proceeded as follows: —

The statute in force at the date of the transaction in question, conferring power on the county commissioners over the subject, provides, "That the county commissioners in each county are authorized, whenever they see fit to do so, to establish a poor-house;" and that "they may take to the county, by grant, devise, or purchase, any tract of land, not exceeding six hundred and forty acres, for the purposes of said poor-house." Sect. 17 and 18, Rev. Stat. Neb., c. 40. Sect. 19 of the same chapter declares that "said commissioners are hereby empowered to receive donations to aid in the establishment of such poor-house; and also empowered, from time to time, as they shall see fit, to levy and collect a tax, not exceeding one per cent, on the taxable property in the county, and to appropriate the same to the purchase of land, not exceeding the aforesaid six hundred and forty acres; and to erect and furnish buildings suitable for a poor-house, and to put into operation and to defray the actual expenses of said poor-house, should the labor of the inmates be inadequate thereto." By sect. 23 of the same act the commissioners are authorized, if they deem it to be for the interest of the county, to appropriate out of any other money belonging to the county any sum not exceeding $2,500 for the purpose of purchasing a farm and erecting thereon suitable buildings, as contemplated in the sections before referred to.

These provisions of the statute were construed by the Supreme Court of the State in *Stewart* v. *Otoe County*, 2 Neb. 177. It does not appear from the report when the decision was made, but as the case arose upon a contract dated in January, 1870, it must, of course, have been long after the making of the contract, which is the foundation of the present litiga-

tion. It was rendered in an action brought upon a similar contract to recover against Otoe County damages for its refusal to accept a deed and execute the note and mortgage contemplated. A judgment sustaining a general demurrer to the petition was affirmed, on the ground that the contract was illegal and void. The court said: "There is no authority of law for the county commissioners to bind the county in the manner contemplated. They cannot give a promissory note, nor can they mortgage the property of the county. Should they formally do so, their action would be a nullity. In the purchase of land for a poor-farm, the authority of the commissioners of a county is very clearly set forth. The mode of raising the money, and paying it over, are all definitely stated. These statutes set a limit beyond which they cannot go. They are a guide, not only to the commissioners, but equally so to all persons dealing with them, who must see to it that their contracts are within the boundaries thus described. . . . Here we find the authority, and indeed the only authority, for the purchase and payment of money for a "poor-farm" by the county commissioners; and here, too, are specially designated the money that may be used for that purpose, together with the mode of raising it. But there is not one word about mortgaging the property of the county to secure the payment of the purchase-money at a given time. The statutes provide the only security that can be given. The public faith is pledged; and a tax, not exceeding one per cent, may be levied upon all the taxable property of the county annually, and, when collected, paid to the person entitled thereto by an order upon the treasurer of the county, payable out of that special fund."

This decision has been accepted by all parties to this suit, and we are not asked to consider any question as to its correctness, or as to our obligation to adopt it. We, therefore, assume it to be the law of Nebraska, applicable to the case, and the basis of further inquiry as to the relative rights of the parties to this litigation. It expressly declares that the county commissioners had power to purchase a poor-farm, but that the power does not extend to an agreement to pay at a definite time, or to give as security for payment a lien upon the land. The vendor must either receive the purchase-money on delivery

of the deed, or wait for its payment in the due course of administration, by the appropriation of the taxes levied, collected, and paid into the treasury applicable to that purpose.

If, in the present case, such had been the original understanding between the parties, and the deed had been delivered without payment, but upon orders drawn upon the county treasurer payable according to law, the vendor would have been obliged to wait during the reasonable delays of administration. "Whoever," said that court, in *Brewer* v. *Otoe County*, 1 Neb. 373, "deals with a county and takes in payment of his demand a warrant of the character of these, no time of payment being fixed, does so under an implied agreement that if there be no funds in the treasury out of which it can be satisfied, he will wait until the money can be raised in the ordinary mode of collecting such revenues. He is presumed to act with reference to the actual condition and the laws regulating and controlling the business of the county. He cannot be permitted, immediately upon the receipt of such warrant, to resort to the courts to enforce payment by judgment and execution, without regard to the condition of the treasury at the time, or the laws by which the revenues are raised and disbursed."

Accordingly, in that case, it was decided that the Statute of Limitations did not apply to cases of such claims against counties. The court, on that point, said: "But these warrants do not, nor was it the intention of the legislature that they should, fall within the operation of this act. . . . Nor can any action rightfully be brought on such warrant until the fund is raised, or at least sufficient time has elapsed to enable the county to levy and collect it in the mode prescribed in the revenue laws. That the legislature never intended that county warrants should be affected by the limitation act before referred to, is evident, I think, from the whole course of legislation respecting them. As late as the 12th of February, 1866, it was enacted that 'all debts heretofore incurred by the county commissioners of any county, acting in good faith, and duly recorded at the time on their books, shall be deemed valid and the county shall be held liable for the same.' Chap. 5, sect. 1, Rev. Stat. . . . From these, as well as numerous other enact-

ments of the legislature that might be cited, I have reached the conclusion that the plea of the Statute of Limitations cannot be successfully made against these warrants, and that whenever it can be shown that the funds have been collected out of which they can be paid, or sufficient time has been given to do so in the mode pointed out in the statute, their payment may be demanded, and if refused, legally coerced."

And if, in such cases, a proceeding in *mandamus* should be considered to be the more appropriate, and, perhaps, the only effective remedy, it also is not embraced in the Statute of Limitations prescribed generally for civil actions. The writ may well be refused when the relator has slept upon his rights for an unreasonable time, and especially if the delay has been prejudicial to the defendant, or to the rights of other persons, though what laches, in the assertion of a clear legal right, would be sufficient to justify a refusal of the remedy by *mandamus* must depend, in a great measure, on the character and circumstances of the particular case. *Chinn* v. *Trustees*, 32 Ohio St. 236; Moses on Mandamus, 190. There is no statute of limitations in Nebraska applicable to that proceeding.

In the present case, however, it was not the understanding of the parties that the vendor should await the collection of taxes, as prescribed by the statute, for the payment of the purchase-money, but, on the contrary, there was an agreement for payment in a definite time, without regard to the condition of the county treasury, and for security by way of notes and mortgages. The agreement, as we have assumed, so far as it relates to the time and mode of payment, is void; but the contract for the sale itself has been executed on the part of the vendor by the delivery of the deed, and his title at law has actually passed to the county. As the agreement between the parties has failed by reason of the legal disability of the county to perform its part, according to its conditions, the right of the vendor to rescind the contract and to a restitution of his title would seem to be as clear as it would be just, unless some valid reason to the contrary can be shown. As was said by this court in *Marsh* v. *Fulton County*, 10 Wall. 676, 684, and repeated in *Louisiana* v. *Wood*, 102 U. S. 294, "the obligation to do justice rests upon all persons, natural and artifi-

cial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." See also *Miltenberger* v. *Cooke*, 18 Wall. 421. The illegality in the contract related, not to its substance, but only to a specific mode of performance, and does not bring it within that class mentioned by Mr. Justice Bradley in *Thomas* v. *City of Richmond*, 12 id. 349. The purchase itself, as we have seen, was expressly authorized. The agreement for definite times of payment and for security alone was not authorized. It was not illegal in the sense of being prohibited as an offence; the power in that form was simply withheld. The policy of the law extends no further than merely to defeat what it does not permit, and imposes upon the parties no penalty. It thus falls within the rule, as stated by Mr. Pollock, in his Principles of Contract, 264: "When no penalty is imposed, and the intention of the legislature appears to be simply that the agreement is not to be enforced, then neither the agreement itself nor the performance of it is to be treated as unlawful for any other purpose." *Johnson* v. *Meeker*, 1 Wis. 436.

The principle was applied in the case of *Morville* v. *American Tract Society*, 123 Mass. 129, 137, where it was said: "The money of the plaintiff was taken and is still held by the defendant under an agreement which it is contended it had no power to make, and which, if it had power to make, it has wholly failed on its part to perform. It was money of the plaintiff, now in the possession of the defendant, which in equity and good conscience it ought now to pay over, and which may be recovered in an action for money had and received. The illegality is not that which arises where the contract is in violation of public policy or of sound morals, and under which the law will give no aid to either party. The plaintiff himself is chargeable with no illegal act, and the corporation is the only one at fault in exceeding its corporate powers by making the express contract. The plaintiff is not seeking to enforce that contract, but only to recover his own money and prevent the defendant from unjustly retaining the benefit of its own illegal act. He is doing nothing which must be regarded as a necessary affirmance of an illegal act."

The decision of this court in *Hitchcock* v. *Galveston*, 96 U. S. 341, 350, covers the very point. There a recovery was allowed for the value of the benefit conferred upon the municipal corporation, notwithstanding, and, indeed, for the reason, that the contract to pay in bonds was held to be illegal and void. "It matters not," said the court, "that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds, because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law."

This doctrine was fully recognized by the Supreme Court of Nebraska as the law of that State in the case of *Clark* v. *Saline County*, 9 Neb. 516, in which it adopts, from the decision of the Supreme Court of California in *Pimental* v. *City of San Francisco*, 21 Cal. 362, the following language: "The city is not exempted from the common obligation to do justice which binds individuals. Such obligations rest upon all persons, whether natural or artificial. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, from this general obligation. If she obtain other property which does not belong to her it is her duty to restore it, or if used to render an equivalent therefor, from the like obligation. *Argenti* v. *San Francisco*, 16 Cal. 282. The legal liability springs from the moral duty to make restitution."

The conveyance by Chapman to the county of Douglas passed the legal title, but upon a condition in the contract which it was impossible in law for the county to perform. There resulted, therefore, to the grantor the right to rescind the agreement upon which the deed was made, and thus to convert the county into a trustee, by construction of law, of the title for his benefit, according to the often repeated rule, as stated by Hill on Trustees, 144, that "whenever the circumstances of a transaction are such that the person who takes the legal estate in property cannot also enjoy the beneficial interest, without necessarily violating some established principle of equity, the court will immediately raise a constructive trust and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties who, in equity, are entitled to the beneficial enjoyment." Upon this principle the vendor of real

estate is treated as trustee of the title for the purchaser; and the mortgagee, having the legal title, after payment of the mortgage debt, is a trustee for the mortgagor. The analogy is complete between these and every case, of which the present is one, where the holder of the legal title is under a duty to convey to another.

But, admitting that Chapman was entitled to call for a reconveyance, it is alleged that the Statute of Limitations of Nebraska, which bars the right to recover the title to real estate in ten years from the time it first accrued, defeats the recovery.

The Statute of Limitations in force on March 5, 1859, which was the date of the deed, prescribed twenty-one years after the cause of action shall have accrued as the period within which an action for the recovery of the title to lands must be brought. Rev. Stat. Neb. 1866, p. 395, sect. 6.

On Feb. 12, 1869, the legislature of Nebraska passed an act, which took effect July 1, 1869, which amended this section so as to reduce the limitation to ten years. It is not denied that if Chapman's cause of action first accrued to him on March 5, 1859, this amendment could not operate upon it, because to give it that effect would be to take away an existing right of action by mere legislation, as the ten years would then have fully expired. It is, therefore, claimed that his right of action for a reconveyance of the title could only have first accrued when the first instalment of the purchase-money became due, that is, on March 5, 1860, which left eight months after the statute took effect before the ten years' limitation would expire, which, it is claimed, would be a reasonable time within which to require that suits upon existing causes of action should be brought. But this view cannot be supported; for the original contract for payment, at a fixed time, is rendered invalid, for the same reason that avoided the notes and mortgage, the objection being, according to the decision of the Supreme Court of Nebraska, that the county had no power to bind itself to pay, in any other manner than that prescribed by the statute. Hence, it must be held, in this aspect of the case, that the right of action was not postponed, after the date of the deed, by the credit given, and if it accrued at that time,

the limitation was twenty-one years, according to the statute then in force, within which the present suit was in fact brought.

But the more satisfactory answer to this defence is, that none of the statutes of limitation referred to apply to the case at all. We have already seen that by the decision in *Brewer* v. *Otoe County*, 1 Neb. 373, it is the declared law of Nebraska that the claim against the county for the purchase-money, on the supposition that the understanding had been to accept payment according to the terms of the statute, was not liable to the bar of the limitation acts. So that the obligation of the county to pay would not be extinguished by the statutory lapse of time. Now, although the right of Chapman to rescind the contract and demand a reconveyance accrued at the very date of the deed, he was not bound to exercise the right, and his cause of action did not accrue, until he had made manifest his election. He had the right to treat as null that part of the contract which was illegal, and having executed it on his part, to waive performance according to its terms, on the part of the county, and wait a reasonable length of time for the county to make the payment in the mode made lawful by the statute, before exerting his power to rescind the contract. Until that time had elapsed, and until, after that, Chapman had elected to rescind, there was no existing cause of action, and consequently nothing upon which the Statute of Limitations could begin to take effect. When that reasonable time expired we have no means of determining. It would depend upon circumstances not disclosed in the record, such as the state of the county treasury, the extent of its other obligations, the value of the taxable property, and its general financial condition. There is nothing whatever to show that the delay that has taken place in filing the present bill has been unreasonable. It is impossible, therefore, to say that any statute of limitations has even begun to run against the cause of action, much less that its bar has become complete.

There is nothing, therefore, to prevent the relief prayed for being granted, if it can be done without injustice to the defendant. On this point, it is said, it would be inequitable to decree a rescission of the contract and a restoration of the title

to and possession of the property, because the parties cannot be placed *in statu quo;* that the circumstances have greatly changed by the increase in the value of the property and the expensive improvements that have been put upon it by the county. If the relief asked and expected was an unconditional reconveyance of the title and surrender of possession, this would undoubtedly be true. But such is not the case. Any such injurious and inequitable results as are deprecated may easily be averted by the simple payment of the amount due on account of the purchase-money, which the appellants consent to receive, which is within the statutory powers of the county, and for which proper provision may be made in the decree.

The principles on which we proceed to establish the right of the appellants to the relief prayed for were announced and acted upon by this court in *Parkersburg* v. *Brown*, in which it was also held that the equity of the original grantor of the property sought to be reclaimed passed by an assignment of the void securities. 106 U. S. 487. This settles the relative rights of Chapman and his co-complainants, the representatives of Ely, and entitles the latter, in the name of the former, to the relief prayed for in the bill.

And, conversely, the right of the county, represented by its taxpayers, to require a rescission of such a contract, on condition of a surrender of the void securities on the part of the vendor, and a reconveyance of the title in consideration of which they were issued, was recognized by this court in *Crampton* v. *Zabriskie*, 101 U. S. 601.

In not granting this relief the Circuit Court erred, and its decree must be reversed, with directions to ascertain the amount due from the county of Douglas on account of the purchase-money of the poor-farm, making any proper allowance as a compensation for the failure of the title to the ten-acre tract, and thereupon to render a decree, unless the amount so found due be paid within a reasonable time, to be fixed by the court, having reference to the necessity of raising the same by taxation, as regulated by the statute, that the county of Douglas be required by its commissioners to execute and deliver a deed, releasing to Chapman all the title acquired by it by

virtue of the deed from him of March 5, 1859, to be conveyed by Chapman to William A. Ely, his co-complainant, and sole representative of Charles A. Ely, upon such terms as the equities of the case may require. It is

So ordered.

JAFFRAY *v.* MCGEHEE.

1. The statute of Arkansas prescribing the manner in which property assigned for the benefit of creditors shall be sold is mandatory.
2. An assignment made in the State is void if it vests in the assignee a discretion in conflict with the provisions of that statute, and authorizes him in effect to sell such property in a manner which they do not permit.

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas.

The statutes of Arkansas contain the following provisions:—

"SECT. 385. In all cases in which any person shall make an assignment of any property, whether real, personal, or choses in action, for the payment of debts, before the assignee thereof shall be entitled to take possession, sell, or in any way manage or control any property so assigned, he shall be required to file in the office of the clerk of the court exercising probate jurisdiction, a full and complete inventory and description of such property; and also make and execute a bond to the State of Arkansas in double the estimated value of the property in said assignment, with good and sufficient security, to be approved by the judge of said court, conditioned that such assignee shall execute the trust confided to him, sell the property to the best advantage, and pay the proceeds thereof to the creditors mentioned in said assignment, according to the terms thereof, and faithfully perform the duties according to law."

"SECT. 387. Said assignee shall be required to sell all the property assigned to him for the payment of debts, at public auction, within one hundred and twenty days after the execution of the bond required by this act, and shall give at least thirty days' notice of the time and place of such sale. And any person damaged by the neglect, waste, or improper conduct of such assignee, shall be

entitled to bring his action on the bond in the name of the State for the use and benefit of such person." Gantt's Digest, pp. 207 and 208.

While these sections were in force, to wit, on Dec. 19, 1878, James C. Moss and John S. Bell, partners under the name of Moss & Bell, doing business as merchants at Pine Bluff, Arkansas, conveyed, by an assignment in writing, all their goods, wares and merchandise, and choses in action to the defendant James M. Hudson, as trustee in trust for the payment of their debts. The deed of assignment preferred certain creditors who afterwards became the complainants in this suit, and required the trustee to pay them in full if the proceeds of the property assigned should be sufficient for that purpose, and if there should be any surplus, to pay it share and share alike to other creditors. The powers conferred on the trustee were as follows: "To sell and dispose of all of said property for cash as he should deem advisable and right, and to this end to use his own discretion, subject to the supervision of the creditors, . . . and to conduct and transact all of the business as he may deem proper in the exercise of a sound discretion, and as he shall deem most advisable for the benefit of creditors and their trust; and he shall have power to appoint such assistants, agents, and attorneys as in his judgment may be necessary to enable him to fulfil this trust," &c.

Hudson accepted the trust. On the 21st of December, 1878, he gave bond according to law, and filed in the office of the clerk of the Probate Court an inventory of the property conveyed to him by the assignment. On the same day, McGehee, Snowden, & Violett recovered in the court below a judgment against Moss & Bell for $10,992. An execution which was issued thereon Jan. 12, 1879, came that day into the hands of the marshal of the district, who levied it on, and took into his possession, the assigned goods and chattels, and was about to advertise and sell them to satisfy the writ, when the bill in this case was filed by the preferred creditors. The bill recited the foregoing facts, and prayed an injunction against the marshal and McGehee, Snowden, & Violett, forbidding them to interfere with the property assigned to Hudson, and that they might be decreed to return the same to him, &c.

The defendants demurred to the bill for want of equity. The Circuit Court sustained the demurrer on the ground that the deed of assignment was void on its face, and dismissed the bill. The complainants thereupon appealed.

Mr. S. F. Clark and *Mr. S. W. Williams* for the appellants.
Mr. U. M. Rose for the appellees.

MR. JUSTICE WOODS delivered the opinion of the court.

The statute of Arkansas provides that the property assigned for the benefit of creditors shall be sold at public auction within one hundred and twenty days after the execution of the bond required of the assignee.

The deed of assignment in effect authorized the assignee to sell at private sale, and at such time and in such manner as he should deem advisable and right. Under this power he could wait an indefinite time, and then sell the property at wholesale, or he could carry on the business of selling off the stock of goods in the ordinary way of retail merchants, and without any limit of time within which the sale should be completed. The powers conferred by the deed of assignment were, therefore, in direct opposition to the policy of the statute. It is true the powers conferred on the trustee were subject to the supervision of the creditors. But this could only mean a majority of the creditors. The assignee was, therefore, authorized by the assignment to dispose of the property assigned in a manner different from that pointed out by the statute, and in disregard of the wishes and remonstrances of a minority of the creditors. The question presented is therefore this, Is an assignment for the benefit of creditors, which authorizes the assignee to violate the provisions of the statute regulating such assignments, valid and binding on the creditors of the assignor?

The contention of the appellant is that the assignment is valid, 1, because the discretion given the assignee by the assignment leaves him at liberty to follow the law; and, 2, because, even if the assignment required him to administer the trust in a manner different from that prescribed by the law, only such directions as conflicted with the law would be void, and the assignment itself would remain valid.

We think that, under the construction given the assignment law by the Supreme Court of Arkansas in *Raleigh* v. *Griffith*, 37 Ark. 150, these positions cannot be maintained. The assignment in that case provided as follows: "The party of the second part," the assignee, "shall take possession of all and singular the property and effects hereby assigned, and sell and dispose of the same, either at public or private sale, to such person or persons, for such prices and on such terms and conditions, either for cash or upon credit, as, in his judgment, may appear best and most for the interest of the parties concerned, and convert the same into money."

It will be observed that the terms of the assignment did not prevent the assignee, in the administration of his trust, from following the directions of the statute in all particulars. He was at liberty to sell for cash at public auction, and within one hundred and twenty days after the filing of his bond. But the assignment vested him with a discretion to do otherwise. The court declared the assignment to be void. It said: "In providing for the sale of the property, the statute is disregarded in the deed of assignment; the assignee was authorized to sell at a private or public sale, and for cash or credit. Under such provision it was in the power and discretion of the assignee to prolong the execution and closing of the trust for an indefinite period. The legislature deemed it expedient, as a matter of public policy, to require assignees, in general deeds of assignment for the benefit of creditors, to sell all property assigned to them, for the payment of debts, at public auction, within one hundred and twenty-five days after the execution of the bond, on thirty days' notice of the time and place of sale." And the court declared: "The statute prescribes a mode of sale in this State, and dissenting creditors are not barred by a deed made in direct contravention of a plain provision of the statute."

The effect of this decision — and there is no other decision of that court in conflict therewith — is that the provisions of the statute respecting the sale of property assigned for the benefit of creditors are mandatory and not directory. See also *French* v. *Edwards*, 13 Wall. 506. This being the construction put upon the law by the Supreme Court of the State

when the assignment in this case was made, it is binding on the courts of the United States. *Brashear* v. *West*, 7 Pet. 608; *Sumner* v. *Hicks*, 2 Black, 532; *Leffingwell* v. *Warren*, id. 599. It follows that the assignment, which vests the assignee with a discretion contrary to the mandates of the statute, and in effect authorizes him to sell the property conveyed thereby in a method not permitted by the statute, must be void, for contracts and conveyances in contravention of the terms or policy of a statute will not be sanctioned. *Peck* v. *Barr*, 10 N. Y. 294; *Macgregor* v. *Dover & Deal Railway Co.*, 18 Q. B. 618; *Jackson* v. *Davison*, 4 Barn. & Ald. 691; *Miller* v. *Post*, 1 Allen (Mass.), 434; *Parton* v. *Hervey*, 1 Gray (Mass.), 119; *Hathaway* v. *Moran*, 44 Me. 67.

The result of these views is that the decree of the Circuit Court dismissing the bill, because the assignment in question was void on its face, was right, and must be

Affirmed.

WIGGINS FERRY COMPANY *v.* EAST ST. LOUIS.

1. The fourth section of the act of the legislature of Illinois passed in 1819, touching a ferry across the Mississippi River from a place in Illinois to the city of St. Louis, Missouri, declares: "That the ferry established shall be subject to the same taxes as are now, or hereafter may be, imposed on other ferries within this State, and under the same regulations and forfeitures." *Held*, that the section provides for equality of taxation; that is to say, that the property of the ferry company shall be valued and taxed by the same rule as other like property, and be subject to the same exactions and forfeitures, but the company is not exempted from any license tax on its ferry-boats which the State or a municipal corporation thereunto authorized might impose.
2. The power to license is a police power, although it may also be exercised for the purpose of raising revenue.
3. A State has the power to impose a license fee, either directly or through one of its municipal corporations, upon the ferry-keepers living in the State, for boats which they own and use in conveying from a landing in the State passengers and goods across a navigable river to a landing in another State.
4. The levying of a tax upon such boats, although they are enrolled and licensed under the laws of the United States, or the exaction of a license fee by

the State within which the property subject to the exaction has its *situs*, is not a regulation of commerce within the meaning of the Constitution of the United States, nor is such tax or fee a duty of tonnage if it be not graduated by the tonnage of the boats or by the number of times they cross the river or land within the limits of the State.

ERROR to the Supreme Court of the State of Illinois.

This was an action of debt brought in the City Court of East St. Louis, St. Clair County, Illinois, by the city of East St. Louis against a corporation of the State of Illinois, known as the Wiggins Ferry Company, to recover from it license money imposed by an ordinance of the city. The Ferry Company pleaded *nil debet.* By consent of parties the cause was submitted to the court on an agreed statement of facts, which is as follows: —

Under and by authority of an act of the legislature of Illinois, entitled "An Act to authorize Samuel Wiggins to establish a ferry upon the waters of the Mississippi," approved March 2, 1819, and amendatory acts, Wiggins and his associates did establish, maintain, and operate a ferry upon and over the Mississippi River, between the city of St. Louis, in the State of Missouri, and the Illinois shore of the river opposite to the city of St. Louis, now within the limits of the city of East St. Louis, from about the time of the passage of the act of 1819, until the organization of the Wiggins Ferry Company in the year 1853, under and by authority of an act of the legislature, entitled "An Act to incorporate the Wiggins Ferry Company," approved Feb. 11, 1853. In the year 1853, under authority of said act of 1853, the successors, heirs, and assigns of Samuel Wiggins, the then owners of the ferry and ferry franchise, and of all the rights, privileges, and immunities granted to Samuel Wiggins and his successors, heirs, and assigns, by proper deeds and assignments conveyed the same to defendant, they having become the stockholders of said ferry company, and from thence hitherto defendant has remained the lawful owner of said ferry, ferry franchise, rights, privileges, and immunities, including the ferry-boats, wharf-boats, wharves, and landings in use by said ferry, and the rights, privileges, immunities, and franchises granted by said act of 1853 and amendatory acts, and under and by authority of all said grants,

franchises, rights, privileges, and immunities defendant has maintained and operated said ferry from thence hitherto. The Mississippi River, at the point between the States of Illinois and Missouri, upon and over which the said ferry is established and operated, has, under the laws of the United States and the rules and regulations established thereunder, by the duly authorized officers of the United States, been declared to be, and is, a navigable river within the purview of such laws; and under said laws, rules, and regulations, and especially in conformity to the Revised Statutes of the United States, title L, "Regulation of vessels in domestic commerce," the defendant for the last twenty years and more has been required to, and has had all its ferry-boats, all of which are more than twenty tons burthen, regularly enrolled and annually inspected and licensed, at an annual cost of from seventy-five dollars to one hundred dollars per boat, according to tonnage and number of men employed on each. The defendant ever since its organization has paid to the county of St. Clair, as a ferry license, the sum of $300 per annum, under the laws of Illinois and the requirements of the county authorities; and has owned the wharves and landing used by said ferry in the city of East St. Louis, which is graded and paved at its own expense, and it has never used or employed any wharf or landing belonging to the city of East St. Louis. Defendant ever since its organization has annually listed for taxation and paid all taxes legally assessed upon all its property; all its personal property, including its boats and franchise, and all its real estate which is situated within the city limits, and including its wharves and landings, having been taxed by said city of East St. Louis ever since the organization of said city.

The Illinois and St. Louis Ferry Company and the St. Louis and Cahokia Ferry Company own and operate ferries over and across the Mississippi River between the said city of St. Louis and the Illinois shore, but without the limits of the city of East St. Louis, both in active competition with the ferry of defendant, neither of which is or ever has been required to pay any sum whatever for license to either the city of East St. Louis or any other municipal corporation except the county of St. Clair, to which they both pay license fees.

The St. Louis Bridge Co., which owns and operates a bridge over the Mississippi River between said cities of St. Louis and East St. Louis, which has been in active competition with defendant ever since said bridge was opened for use in July, 1874, is required to pay no license fee whatever to the city of East St. Louis. On June 1, 1868, the city council of the city of East St. Louis duly passed and published "Ordinance No. 70," parts of which are as follows: —

"SECT. 1. No person, firm, company, or corporation shall be engaged in, prosecute, or carry on any trade, business, calling, or profession hereinafter mentioned without first having obtained a license therefor.

. . . . . .

"SECT. 10. Keepers of ferries shall pay fifty dollars license for each boat plying between this city and the opposite bank of the river for one year, or twenty-five dollars for each boat for six months."

In compliance with the above ordinance defendant paid said city a license fee of fifty dollars per annum on each of its ferry-boats, its last license thereunder being from May 1, 1874, to May 1, 1875.

On Oct. 7, 1878, said city council passed ordinance No. 817, which is substantially the same as ordinance No. 70, except that it fixes the license fee at $100 per annum for each boat. On May 1, 1875, and from thence hitherto, the defendant, in the operation of its ferry between said cities of St. Louis and East St. Louis, has employed eight ferry-boats (including two tugs and one transfer-boat), and since said May 1, 1875, has not taken out any license nor paid any license fee to said city of East St. Louis. Upon the facts here stated, and the laws applicable thereto, the court shall determine the right of plaintiff to demand and the liability of defendant to pay the license fee, fixed by said ordinance, or either of them, and render judgment accordingly, and this without regard to the pleadings in the case. The acts of the legislature, and the laws, rules, and regulations of the United States, and the enrolments, inspections, and licenses herein mentioned or referred to, and the charter and ordinances of said city of East St.

Louis, or copies thereof, may be used and referred to as a part of the record in this case.

So much of the act of 1819, referred to in the agreed statement of facts, entitled "An Act to authorize Samuel Wiggins to establish a ferry upon the waters of the Mississippi River," as is pertinent to this case, is as follows: —

"SECT. 1. That Samuel Wiggins, his heirs and assigns, be, and they are hereby, authorized to establish a ferry on the waters of the Mississippi near the town of Illinois, in this State, and to run the same from lands at the said place that may belong to him."

"SECT. 4. That the ferry established shall be subject to the same taxes as are now, or hereafter may be, imposed on other ferries within this State and under the same regulations and forfeitures."

So much of the act of Feb. 11, 1853, "to incorporate the Wiggins Ferry Company," as is material to this case, is as follows: —

After a preamble, which recited the above-mentioned act of 1819 and acts amendatory thereof, it was enacted: —

"SECT. 1. That (certain persons, naming them), and their associates, successors, and assigns, are hereby created a body corporate and politic by the name and style of the 'Wiggins Ferry Company,' . . . and the said company shall have full power . . . to purchase, hold, use, and enjoy the ferry franchise granted to Samuel Wiggins, his heirs and assigns, by the act referred to in the preamble of this act, . . . to keep a ferry or ferries at and from any point or points on said land, across the Mississippi River to St. Louis, in the State of Missouri, and use and enjoy all the rights, privileges, franchises, and emoluments recited in the preamble of this act as having been heretofore granted to the said Samuel Wiggins, his heirs and assigns."

"SECT. 7. . . . *Provided*, that nothing in this act contained shall be construed to create any private right so as to interfere with the powers of any existing municipal corporation, or with the right of the legislature, at any time hereafter, to create municipal corporations within the limits herein specified, and to confer upon said corporations all such powers of police . . . as may be usually or properly confided to a city corporation under the Constitution of Illinois."

The authority to pass the ordinance under which the plaintiff claimed license money from the defendant was its charter, passed in 1869, which empowered it "to regulate, tax, and license ferry-boats." Private Laws of Illinois, 1869, vol. i. p. 893.

Upon these facts the court found the issues for the plaintiff, and assessed its damages at $1,600, for which sum it rendered judgment against the defendant.

The case was taken by the appeal of the defendant to the Appellate Court of the Fourth District of Illinois, and the judgment of the City Court of East St. Louis was affirmed. The defendant then carried the case, by appeal, to the Supreme Court of Illinois, which affirmed the judgment of the Appellate Court.

To obtain a reversal of this judgment of the Supreme Court, the defendant brought this writ of error.

Mr. H. P. Buxton for the appellant.

Mr. M. Millard, *Mr. J. M. Freels*, and *Mr. B. H. Canby* for the appellee.

MR. JUSTICE WOODS delivered the opinion of the court.

The first contention of the plaintiff in error is that the fourth section of the act of 1819, which declared that the Wiggins Ferry should be subject to the same taxes as were then or might thereafter be imposed on other ferries within the State, and under the same regulations and forfeitures, and the charter of the Wiggins Ferry Company, which authorized said company to use and enjoy the ferry franchise granted to Samuel Wiggins, and to use and enjoy all the rights, privileges, and emoluments recited in the preamble of the act as having been granted to Wiggins and his heirs and assigns, constituted a contract between the ferry company and the State, by which the power to tax the ferry company was limited to the imposition of the same taxes as were then or might thereafter be imposed on other ferries within the State; and that the charter of the city of East St. Louis, which authorized the city to regulate, tax, and license ferry-boats, and the ordinance of the city imposing a license tax on the ferry-boats of the company, impaired the obligation of the contract, and was therefore unconstitutional and void.

We are of opinion that the charter of the company cannot be so construed as to exempt it from any taxation which the State might itself see fit to impose or authorize to be imposed by the city of East St. Louis.

It is a rule of interpretation that every grant from the sovereign authority is, in case of ambiguity, to be construed strictly against the grantee and in favor of the government. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; *Mills* v. *St. Clair County*, 8 How. 569; *Attorney-General* v. *Boston*, 123 Mass. 460.

This rule has been frequently applied by this court in cases where exemption from taxation was set up by corporations under the provisions of their charters. In *Philadelphia & Wilmington Railroad Co.* v. *Maryland*, 10 How. 376, it was declared that "the taxing power of a State is never presumed to be relinquished unless the intention to relinquish is declared in clear and unambiguous terms;" and in *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, it was said that "the language of this court has always been cautious and affirmative of the right of the State to imposes taxes, unless it has been relinquished by unmistakable words, clearly indicating the intention of the State to do so."

So in *Railroad Company* v. *Commissioners*, 103 U. S. 1, the Chief Justice, speaking for the court, declared: "Grants of immunity from taxation are never to be presumed. On the contrary, all presumptions are the other way, and, unless an exemption is clearly established, all property must bear its just share of the burdens of taxation. These principles are elementary and should never be lost sight of in cases of this kind." To the same effect see *Railroad Companies* v. *Gaines*, 97 id. 697.

So in *Bank* v. *Tennessee*, 104 id. 493, this court declared, speaking by Mr. Justice Field: "That statutes imposing restrictions upon the taxing power of a State, except so far as they tend to secure uniformity and equality of assessment, are to be strictly construed is a familiar rule. Against the power nothing is to be taken by inference and presumption. When a doubt arises as to the existence of the restriction, it is to be decided in favor of the State."

If any serious doubt could arise concerning the interpretation of sect. 4 of the act of 1819, which the plaintiff in error contends was incorporated as a provision of its charter, the authorities cited would settle that doubt in favor of the right of the city of East St. Louis to impose the license tax complained of.

But we are of opinion that the meaning of the section is not doubtful. The ferry of Wiggins had only one of its landings in the State of Illinois; the other was in the State of Missouri. The evident purpose of the section was to prevent the ferry, by reason of that circumstance, from escaping the same burdens of taxation as were imposed on ferries entirely within the State and not to limit the taxing power of the legislature. It declares that the ferry of Wiggins shall be subject to the same taxes which were then or might thereafter be imposed on other ferries within the State, and under the same regulations and forfeitures, but it does not intimate that the State shall not impose on it such other taxes within its constitutional power as to it may seem fit.

The most favorable construction for the plaintiff in error that could be placed upon its charter is that it provided for equality of taxation, that is to say, that the property of the ferry company should be valued and taxed by the same rule as other like property, and that the same exactions and forfeitures only as were imposed on like property, similarly situated, should be imposed on it. It certainly cannot be contended that its ferry on one of the great arteries of commerce, crossing the Mississippi River, and having each of its landings in a city, should only pay the same identical taxes and license fees as a country ferry over an inconsiderable stream. All that could be reasonably claimed under its charter is that it should be subjected to no higher State and municipal taxation and no greater license fees than other like property similarly situated. Giving the charter this construction, the plaintiff in error has no ground of complaint. It is not shown that the State and county taxation bears unequally on the ferry company. The ordinance of the city of East St. Louis makes no discrimination in favor of any other ferry similarly situated which it is authorized to regulate, tax, and license. The same license fee is

exacted of all keepers of ferries within the corporate limits as are imposed upon the plaintiff in error.

But the contention of the plaintiff in error seems to be that, under the terms of its charter, it is exempted from the imposition by the city of East St. Louis of any license fee whatever. So far from this being the fact, the charter, by the proviso to sect. 1, expressly reserved the power of any existing municipal corporation, or any that might be thereafter created within the limits of the ferry company's lands, to exercise all such powers of police as might be properly conferred on a city corporation. The power to license is a police power, although it may also be exercised for the purposes of raising revenue. We cannot say, as a matter of law, that when a municipal corporation is authorized "to regulate, tax, and license ferry-boats," the imposition of a license fee of $100 per boat is not within the power to regulate and license, and is consequently not within the police power.

It follows, therefore, that the ordinance of the city of East St. Louis and the charter of the city, by which the ordinance is authorized, do not impair the obligation of any contract between the ferry company and the State.

The next question presented by the assignments of error relates to the power of the State to impose a license fee either directly or through one of its municipal corporations upon the keepers of ferries living in the State, for boats owned by them and used in ferrying passengers and goods from a landing in the State, across a navigable river, to a landing in another State. It is insisted by the plaintiff in error that such an exaction is forbidden by the Constitution of the United States, 1, because it is a regulation of commerce between the States, and, therefore, within the exclusive power of Congress; and, 2, because it is a duty of tonnage, which the States are forbidden by the Constitution to lay without the consent of Congress.

In our opinion neither of these contentions is well founded. The levying of a tax upon vessels or other water-craft or the exaction of a license fee by the State within which the property subject to the exaction has its *situs*, is not a regulation of commerce within the meaning of the Constitution of the

United States. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Passenger Cases*, 7 How. 283; *Morgan* v. *Parham*, 16 Wall. 471. In *Gibbons* v. *Ogden* it was settled that the clause of the Constitution conferring on Congress the power to tax, and the clause regulating and restraining taxation, are separate and distinct from the clause granting the power to Congress to regulate commerce. In all of the cases just cited the right of a State to tax a ship owned by one of her citizens and having its *situs* within the State, although used in foreign commerce or in commerce between the States, was distinctly recognized. Thus, in *Passenger Cases*, it was said by Mr. Justice McLean: "A State cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce the same as other property owned by its citizens. A State may tax the stages in which the mail is transported, but this does not regulate the conveyance of the mail any more than taxing a ship regulates commerce, and yet, in both instances, the tax on the property in some degree affects its use."

In the case of *Transportation Company* v. *Wheeling*, 99 U. S. 273, this court sustained a tax levied by the city of Wheeling upon steamboats used in navigating the Ohio River between that city and Parkersburg, and the intermediate places on both sides of the river in the States of West Virginia and Ohio, the company owning the boats having its principal office in Wheeling.

The exaction of a license fee is an ordinary exercise of the police power by municipal corporations. When, therefore, a State expressly grants to an incorporated city, as in this case, the power "to license, tax, and regulate ferries," the latter may impose a license tax on the keepers of ferries, although their boats ply between landings lying in two different States, and the act by which this exaction is authorized will not be held to be a regulation of commerce.

In the case of *Fanning* v. *Gregoire*, 16 How. 524, it was declared by this court, speaking of the charter of Fanning to ferry across the Mississippi River at Dubuque, that the exercises of the commercial power by Congress did not interfere with the police power of the States in granting ferry licenses.

And in the case of *Conway* v. *Taylor's Ex'rs*, 1 Black, 603, Mr. Justice Swayne, speaking for the court, in reference to a ferry established across the Ohio River, between the States of Ohio and Kentucky, declared that the power to establish and regulate ferries did not belong to Congress under the power to regulate commerce, but belonged to the States, and lay within the scope of that immense mass of undelegated powers reserved by the Constitution to the States.

The authorities cited settle beyond controversy that the ordinance of the city of East St. Louis imposing upon the keepers of ferries within its limits, and the act of the legislature by which such ordinance was authorized, do not invade the exclusive power of Congress to regulate commerce conferred on it by the Constitution.

It is next insisted by plaintiff in error that the license fee exacted by the ordinance of the city of East St. Louis is a tonnage tax, which the States are forbidden to lay without the consent of Congress. This contention has no ground to rest on. In the first place, the license fee is levied not on the ferry-boat, but on the ferry-keeper. The first section of the ordinance declares that no person shall carry on any trade, business, calling, or profession thereinafter mentioned without having first obtained a license therefor, and the ordinance, after having enumerated many other trades and callings, and fixed the license fee for carrying them on, declares, in sect. 10, that keepers of ferries shall pay $100 license fee for each boat plying between the city and the opposite bank of the river.

The power of the State of Illinois to authorize any city within her limits to impose a license tax on trades or callings generally, especially those which are *quasi* public, cannot be disputed. Draymen may be compelled to pay a license tax on every dray owned by them, hackmen on every hack, tavern-keepers on their taverns in proportion to the number of the rooms which they keep for the accommodation of guests. We do not think that the Constitution of the United States, by the section which prohibits a State from laying a duty of tonnage, protects the keeper of a ferry from a similar tax upon the boats which he employs. Whether a license fee is exacted

under the power to regulate or the power to tax is a matter of indifference if the power to do either exists. The license fee exacted is, in effect, laid upon the business of keeping a ferry; for it is not laid upon all boats owned by the ferry-keeper, but only on those plying between the two banks of the river, and is graduated by the number of boats used by him.

The exaction of this license fee is identical in kind with the imposition upon a proprietor of hacks and express wagons of a specified sum for every vehicle owned by him and used in carrying passengers or baggage and merchandise from East St. Louis to the city of St. Louis, by way of the bridge connecting those cities.

In the second place, the amount of the license fee is not graduated by the tonnage of the ferry-boats. It is the same whether the boats are of large or small carrying capacity. This, although not a conclusive circumstance, is one of the tests applied to determine whether a tax is a tax on tonnage or not. *Steamship Company* v. *Portwardens*, 6 Wall. 31; *State Tonnage Tax Cases*, 12 id. 204; *Peete* v. *Morgan*, 19 id. 581; *Cannon* v. *New Orleans*, 20 id. 577. If the same license fee had been exacted of the keeper of a ferry across a navigable stream entirely within the State of Illinois, Chicago River, for instance, it would scarcely be contended that it fell within the constitutional prohibition. The fact that in this case the ferry crosses a river which divides two States cannot change the nature of the exaction.

As we have already said, the burden imposed by the ordinance is not measured by the tonnage of the ferry-boats, it is not measured by the number of times they cross the Mississippi River or land at the city of East St. Louis. We are of opinion, therefore, that it is not a duty of tonnage, nor is it in its essence a contribution claimed for the privilege of using a navigable river of the United States or of arriving or departing from one of its ports, and is therefore not prohibited by the Constitution of the United States.

Counsel for plaintiff in error contend that if the power of the city of East St. Louis to exact a license fee of $100 from every ferry-boat is conceded, the city could double or treble the fee at will. It is sufficient to say, in reply to this, that it does not

follow from the fact that a power is liable to abuse, that it does not exist. If the power is abused, the remedy is with the legislature.

Lastly, it is contended by the plaintiff in error, that the fact that the boats of the ferry company have been enrolled, inspected, and licensed under the laws of the United States, is a protection against the exaction of any license fee by the State or by its authority.

In *Gibbons* v. *Ogden*, *ubi supra*, it was said by the court that inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are parts of the immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government. In the subsequent case of *Conway* v. *Taylor*, *ubi supra*, this court, relying as authority on the declaration just cited, held that the fact that Conway had caused his ferry-boat to be enrolled and licensed, under the laws of the United States, at the custom-house in Cincinnati, to carry on the coasting trade, did not authorize him to carry on the business of a ferry between Cincinnati and Newport, Kentucky, in disregard of the rights of Taylor, who had an exclusive license from the authorities of the State of Kentucky to ferry from the Kentucky to the Ohio side of the river.

The power of Congress to require vessels to be enrolled and licensed is derived from the provision of the Constitution which authorizes it "to regulate commerce with foreign nations and among the several States." We have already seen that this court, in *Fanning* v. *Gregoire*, *ubi supra*, has held that this right of Congress "does not interfere with the police powers of a State in granting ferry licenses."

These authorities show that the enrolment and licensing of a vessel under the laws of the United States does not of itself exclude the right of a State to exact a license from her own citizens on account of their ownership and use of such property having its *situs* within the State.

Counsel have argued other assignments, based on the construction given by the Supreme Court of Illinois to the Con-

stitution and laws of the State. As, in our opinion, all the Federal questions presented by the record were rightly decided by that court, it is not our province to consider these assignments. *Murdock* v. *City of Memphis*, 20 Wall. 590.

We find no error in the record.

Judgment affirmed.

KOUNTZE *v.* OMAHA HOTEL COMPANY.

OMAHA HOTEL COMPANY *v.* KOUNTZE.

1. An appeal bond in an ordinary foreclosure suit in a court of the United States does not operate as security for the amount of the original decree; nor for the interest accruing thereon pending the appeal; nor for the balance due after applying the proceeds of the mortgaged premises; nor for the rents and profits, or the use and detention of the property pending the appeal: but only for the costs of the appeal, and the deterioration or waste of the property, and perhaps burdens accruing upon it by non-payment of taxes, and loss by fire if it be not properly insured. *Quære*, Is its mere depreciation in market value any cause of recovery on the bond.
2. An appeal bond in such a suit, instead of following the statutory requirement, "that the appellant shall prosecute his appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs," superadds the words that he shall "pay for the use and detention of the property covered by the mortgage in controversy during the pendency of the appeal." In an action on the bond, — *Held*, that these words must be rejected, and the bond construed as having its ordinary and proper legal effect, the judge taking it having no right to exact such an addition to the condition of an appeal and *supersedeas*.
3. This case distinguished from those in which official bonds, and bonds given to the government for the purpose of enjoying some office or privilege, have been sustained as contracts at common law.

ERROR to the Circuit Court of the United States for the District of Nebraska.

The case is stated in the opinion of the court.

Mr. James M. Woolworth for Kountze.

Mr. John I. Redick, *Mr. George E. Prichett*, and *Mr. Jeremiah S. Black*, *contra*.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is an action on an appeal bond given for *supersedeas* of execution on a decree of foreclosure rendered by the Circuit

Court for the District of Nebraska, and appealed to this court and affirmed; and the question is as to the measure of damages to be recovered on said bond.

The foreclosure suit was brought to raise the amount due on certain bonds of the Omaha Hotel Company out of certain land and premises situated in the city of Omaha, which had been mortgaged by the company to secure the payment thereof. A decree was made on the 8th of May, 1875, by which it was ordered that the mortgaged premises be sold and the proceeds applied to pay the debt, after paying costs of sale and insurance and taxes accruing in the mean time. The defendants appealed, and, to obtain *supersedeas* of execution, gave the appeal bond which is the subject of the present controversy. The bond was in the penalty of $50,500, and after reciting the decree and appeal was conditioned as follows: "Now, the condition of the said obligation is such that if the said Omaha Hotel Company shall duly prosecute said appeal to effect, and pay said Jeptha H. Wade, James W. Bosler, Thomas Wardell, John A. Creighton, administrator of the estate of Edward Creighton, deceased, Andrew J. Poppleton, Augustus Kountze, Herman Kountze, and Henry W. Yates, their executors, administrators, or assigns, for the use and detention of the property covered by the mortgage in controversy in this suit, during the pendency of said appeal, and the costs of the suit, and just damages for delay, and costs and interest on said appeal, if it fails to make good its plea, this obligation shall be void; otherwise to remain in full force and virtue."

The decree being affirmed and the premises sold, the proceeds were found to be insufficient to satisfy the debt, to the amount of $88,480.85; and for this deficiency a decree was rendered against the Omaha Hotel Company, and an execution issued, which was returned unsatisfied.

Thereupon the present suit was brought on the appeal bond, and the plaintiffs by their petition claimed the entire penalty and interest on the facts above stated and on the ground that the company was insolvent, that, pending the appeal, the property had depreciated in value $30,000, and that the use and detention of it was worth $30,000 more. The defendants, in their answer, averred that they had kept the property in good

repair at a large expense, had paid all the taxes upon it, and had kept it insured for the benefit of the bondholders to the amount of $100,000; and that instead of depreciating, it was worth much more when the sale was made, than it was at the time of the original decree. The jury, by a special verdict, found that the rental value of the property, pending the appeal, with interest to the time of trial, was $44,838.67, and that the expenses paid by the defendants for taxes, insurance, and repairs, with interest thereon, was $26,082.71; that the value of the property in May, 1875, was $92,500, and in April, 1878, $139,000; that in May, 1875, it would have sold at master's sale for $62,000 [whereas it sold in 1878 for $120,000]; that the interest on the decree pending the appeal was $58,870.25; and that the penalty of the bond, with interest from July 11, 1878, to the time of the trial, amounted to $57,750; and that the costs of the original suit unpaid by the defendants was $530.

The court rendered judgment in favor of the plaintiffs for $19,735.93, being the difference between the rental value of the property pending the appeal, and the sums expended by the defendants for taxes, insurance, and repairs, allowing interest on both sides; with the addition of the item of $530 costs unpaid by the defendants, and interest from the time of trial to the date of the judgment.

Both parties brought writs of error.

The plaintiffs now contend that they ought to have had judgment for the entire penalty of the bond, because, first, the bond expressly provides that the Omaha Hotel Company shall pay for the use and detention of the property pending the appeal, as well as costs and just damages for delay, which greatly exceeds the penalty; secondly, if the bond is to be limited in effect to the terms of the statute prescribing a bond, the damages are still greater than the penalty, its legal effect being to secure, to the extent of the penalty, 1, payment of the whole decree beyond what may be produced by the sale of the property; 2, the interest accruing pending the appeal, which alone exceeds the penalty; 3, the value of the use and detention of the property pending the appeal.

The defendants contend that judgment should have been given for them.

The appeal bond sued on in this case was given under the requirement of sect. 1000 of the Revised Statutes, which declares that every justice or judge signing a citation or any writ of error shall, except in cases brought up by the United States, &c., take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a *supersedeas* and stays execution, or all costs only where it is not a *supersedeas* as aforesaid. Sect. 1007 gives the effect of a *supersedeas* to a writ of error where such a bond as above described is given, and the writ is sued out and filed in proper time. Sect. 1010 declares that, where judgment is affirmed, the court shall adjudge to the respondent in error just damages for his delay, and single or double costs, at its discretion. Sect. 1012 declares that appeals from the Circuit Courts, &c., shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error.

These enactments are substantially a reproduction of like clauses in the Judiciary Act of 1789, as regards writs of error, and of the act of 1803, as regards appeals. The material words are the clause in the bond which declares "*that the plaintiff in error* [*or appellant*] *shall prosecute his writ to effect, and, if he fail to make his plea good, shall answer all damages and costs.*" The scope and effect of this phrase, as applied to cases like the present, are the principal point in controversy. The bond sued on has an additional phrase, not required by the law, the effect of which will be separately considered.

By the common law a writ of error, without any security, was of itself a *supersedeas* of execution from the time of its allowance or recognition by the court to which it was directed; and even before, if the defendant in error had notice of it; or, in the Common Pleas, from the time of its delivery to the clerk of the errors of that court, whose business it was, amongst other things, to prepare the returns. 1 Tidd's Pract. 530, 1145; Impey's Pract. C. P. 16; Petersd. Abr., tit. Error, I. (H. a.). The presentation of the writ issuing from the Supe-

rior Court stopped all further proceedings except such as were incidental to a compliance with its command to certify the record. But as writs of error came to be sued out for the purpose of delay, various acts of Parliament were passed, requiring security in certain cases, in order that the writ might operate as a *supersedeas*. First, without referring to a statute in the time of Elizabeth, the statute of 3 James I., c. 8, declared that no execution should be stayed or delayed, upon or by any writ of error, or *supersedeas* thereon, for the reversing of any judgment in debt upon a single bond, or a bond with condition for the payment of money only, or in debt for rent, or upon any contract, unless the plaintiff in error, with two sufficient sureties, should first be bound to the plaintiff in the judgment, "by recognizance, in double the sum recovered by the former judgment, to prosecute the writ of error with effect, and also to satisfy and pay, if the said judgment should be affirmed, or the writ of error non-prossed, all and singular the debts, damages, and costs, adjudged upon the former judgment; and all costs and damages to be awarded for the delaying of execution." This statute was specific as to the cases in which bail in error (as it was called) was required, and it was frequently held that it could not be required in any other cases. 2 Sellon's Pract. 367–374; 2 Tidd, 1150. Subsequently by the statute of 13 Car. II., c. 2, as enlarged by 16 & 17 Car. II., c. 8, the same recognizance was required to stay execution in all personal actions in which a judgment was rendered upon a verdict, and in most cases double costs were given in case the judgment was affirmed; and in writs of error upon judgment after verdict in dower and ejectment it was provided that execution should not be stayed unless the plaintiff in error should be bound to the plaintiff, in such reasonable sum as the court below should think fit, with condition, that if the judgment should be affirmed, or the writ of error discontinued, in default of the plaintiff in error, or he should be nonsuited therein, that then he should pay such costs, damages, and sum or sums of money as should be awarded upon or after such judgment affirmed, discontinuance, or nonsuit; and to ascertain the sum and damages to be awarded, it was provided that the court should issue a writ of inquiry as well of the mesne profits as

of the damages by any waste committed after the first judgment in dower or ejectment, and give judgment therefor and for costs. This was the form in which the law stood for more than a century prior to our Revolution, and is believed to have generally prevailed in this country either by force of the English statutes, or similar statutes adopted by the Colonies themselves down to the time of the passage of the Judiciary Act by Congress in 1789. See 1 Rev. Laws of N. Y. (1813), p. 143, act of 1801; Acts of New Jersey, Feb. 1, 1799, and Feb. 28, 1820, Elmer's Dig. 159, 160; Act of Maryland, 1713, c. 4, 1 Kilty's Laws; and Alexander's British Statutes in force in Maryland, 16 & 17 Car II., c. 8. In Virginia, by the act of 1788, it was provided that before granting any appeal from a county to a district court, or issuing any writ of error or *supersedeas*, the party praying the same should enter into bond with sufficient security, in a penalty to be fixed by the court or judge, with condition to pay the amount of the recovery, and all costs and damages awarded, in case the judgment or sentence should be affirmed; and the damages were fixed at ten per cent per annum upon the principal sum and costs recovered in the inferior court; and the same provisions were applied to appeals and writs of error to the court of appeals. By the act of 1794, on appeal from a decree in equity to the High Court of Chancery, the condition of the appeal bond required was, to satisfy and pay the amount recovered in the county court, and all costs, and to perform in all things the decree, if the same should be affirmed. Laws of Virginia, ed. 1814, pp. 87, 115, 448. In Massachusetts, as appears by an early case (1804), a *supersedeas* was granted upon the plaintiff in error giving bond to respond all damages and costs in case the judgment should be affirmed. *Bailey* v. *Baxter*, 1 Mass. 156. In Pennsylvania, where the judgment was affirmed upon a writ of error, the execution included the interest from the date of the original judgment. *Respublica* v. *Nicholson*, 2 Dall. 256.

It is thus seen that, in the case of money judgments, bail in error was required to secure, 1, the amount of the original judgment; 2, the costs and damages occasioned by the delay of execution. In the case of dower and ejectment, where the

main thing in controversy was land, bail was required to secure only such costs, damages, and money as should be awarded after affirmance of judgment, for mesne profits and waste pending the appeal.

In relation to money judgments, a long train of decisions in England shows that the damages for delay for which the bail in error were to respond were the interest on the sum recovered below from the day of signing final judgment to the time of affirmance, and costs in the writ of error, and in some cases double costs. In the Exchequer Chamber, when double costs were recoverable, the court exercised its discretion whether to allow interest or not, it not being allowed as a matter of course; but interest was only allowed where the original demand was one that drew interest, and not in cases of mere tort or unliquidated damages. Tidd, 1182, 1183. In the House of Lords, they gave large or small costs in their discretion, according to the nature of the case, and the reasonableness or unreasonableness of litigating the judgment of the court below. Id. 1184.

We have no reason to believe that the rule of damages for delay on a recognizance, or bond in error, was materially different in this country, in 1789, from that which prevailed in England. The statutes being substantially the same, undoubtedly the same rule prevailed in administering them.

On appeals in chancery the practice in England, in case of an appeal from the Master of the Rolls to the Lord Chancellor, was for the party appealing to deposit £10, to be paid to the other party if the decree was not materially varied, and he was also required to pay the costs of the appeal; and on appeal from the Court of Chancery to the House of Lords, the appellant was obliged to make a deposit of £20, and give security by recognizance in the sum of £200, to pay such costs to the defendant in the appeal, as the court should appoint, in case the decree should be affirmed. Harrison's Pract. in Chancery, ed. Newland, pp. 342, 349. In 1810 these amounts were doubled. Smith's Ch. Pr. 27, 44. If a party wished to file a bill of review, the general rule was that he must perform the decree before filing his bill.

Such being the rules prevailing on the subject when the act of 1789 was passed, which required the plaintiff in error to give security "to prosecute the writ of error to effect, and to answer all damages and costs if he failed to make his plea good," the extremely general terms of the law are noticeable. According to the English law, the terms "all damages and costs" would only cover the damages for delay, security for the original judgment being expressly provided for by separate words; but the act of Congress does not say "damages for delay," but generally "all damages and costs," without any specific provision for the original judgment; and the bond is required in all cases, and not merely on error to money judgments and judgments in dower and ejectment; and not merely in cases at law, but in cases of equity also; for the writ of error was the process of review prescribed by the Judiciary Act both at law and in equity; and when appeals were allowed in the latter by the act of 1803, they were subjected to the same rules and conditions as writs of error. The only guide, or hint of guidance, given by the Judiciary Act as to what damages were to be awarded on a bond in error, other than what might be deduced by analogy from the English and State laws, is an expression contained in the twenty-third section, where it is said that if, upon a writ of error, the Supreme or Circuit Court shall affirm a judgment or decree, they shall adjudge or decree to the respondent in error *just damages* for his delay, and single or double costs at their discretion. So that, as the result of the whole, the matter was left very much at large, and subject to the regulation of the courts, and such analogies as existing laws afforded.

The act of Dec. 12, 1794, c. 3, declares that the security to be required on the signing of a citation on any writ of error which shall not be a *supersedeas* and stay execution, shall be only to such an amount as, in the opinion of the justice or judge taking the same, shall be sufficient to answer all such costs as, upon an affirmance of the judgment or decree, may be adjudged or decreed to the respondent in error. The substance of this act is reproduced in the Revised Statutes; but it sheds no light on the question of damages as distinguished from mere costs.

The Supreme Court at an early day (February Term, 1803) adopted the two following rules: —

"1. In all cases where a writ of error shall delay the proceedings on the judgment of the Circuit Court, and shall appear to have been sued out merely for delay, damages shall be awarded at the rate of ten per centum per annum on the amount of the judgment.

"2. In such cases where there exists a real controversy, the damages shall be only at the rate of six per centum per annum. In both cases the interest is to be computed as part of the damages." 1 Cranch, xviii.

The latter rule was changed in 1852, when by an amended rule, still in force, on affirmance of a judgment, interest was directed to be calculated and levied from the date of the judgment below until paid, at the same rate that similar judgments bear interest in the courts of the State where the judgment was rendered. 13 How. v.

The other rule was amended in 1871, giving ten per cent damages in addition to interest, when the writ of error appears to be sued out merely for delay. 11 Wall. x.

And both rules were extended to appeals from decrees in chancery for the payment of money in 1852. 13 How. v.

These rules may undoubtedly be regarded as prescribing the measure of damages for delay in the cases in which they apply; that is, in the case of money judgments and decrees. But whether the bond in error covered the original debt was not distinctly decided until the case of *Catlett* v. *Brodie*, 9 Wheat. 553, came before the court. In that case judgment was rendered for the plaintiff below for a large sum; but the judge who signed the citation took a bond in a small amount to respond the damages and costs. On a motion to dismiss the writ of error for insufficiency of the bond, it was contended for the plaintiff in error that the act meant only to provide for such damages and costs as the court should adjudge for the delay. But the court held that the word "damages" covered whatever losses the plaintiff might sustain by the judgment's not being satisfied and paid after the affirmance; in other words, that the bond in error had the same effect as the recognizance required by the English statutes, and was intended to secure

payment of the original judgment, as well as the damages for delay. Hence, the bond should have been taken in an amount sufficient to secure the whole debt; and it was ordered that the writ of error should be dismissed unless, within thirty days from the rising of the court, the plaintiff in error should give a bond sufficient in amount to secure the whole judgment.

In *Stafford* v. *Union Bank of Louisiana*, 16 How. 135, though no decision was made, because the case was not properly before the court, an opinion was delivered by Mr. Justice McLean, as for the court, that the same rule would apply in case of an appeal from a decree in equity for the sale and foreclosure of certain negroes who had been delivered to a receiver *pendente lite*; and that the bond should have been to secure the whole mortgage debt. Mr. Justice Catron dissented from this view, holding that, where there was a fund in the possession of the court, no security to cover its contingent loss should be required; and that to construe the act as if this were a simple judgment at law would operate most harshly.

In accordance with the suggestion made by the court, application was made for a *mandamus* to the judge below, to compel him to cause the decree to be carried into execution notwithstanding the appeal. On a rule to show cause the judge returned the facts as above stated, and that he had no power to take further order in the case. But the court, deeming the appeal bond insufficient to operate as a *supersedeas*, granted the *mandamus*. 17 How. 275.

Subsequent decisions have undoubtedly modified the rule followed in this case, and, indeed, have overruled it, and are more in accordance with the views expressed by Mr. Justice Catron.

In *Roberts* v. *Cooper*, 19 How. 373, which was an action of ejectment for the recovery of mining lands, the plaintiff having recovered the land with only nominal damages, a writ of error was brought by the defendant, who was required to give a bond for only $1,000. The plaintiff applied to this court for an order requiring additional security, producing affidavits to show that the damages which he would sustain by the delay in working the mine, caused by the *supersedeas*, would exceed $25,000. The court refused the motion; and said that if it

were a money demand, on which a sum certain had been given by a judgment, it would have been the duty of the judge to take care that good security was given; but that in ejectment, where only nominal damages are recovered, the court cannot interfere to enlarge the security to recover damages which a plaintiff may recover in an action for mesne profits, or other losses he will sustain by being kept out of possession. The court held that the case was not provided for by any legislation of Congress, as had been done in England by the statute of 16 & 17 Car. II., c. 8.

In *Rubber Company* v. *Goodyear*, 6 Wall. 153, the subject again came before this court on a question as to the amount of security required upon appeal from a personal decree in equity, where a portion of the amount had been secured by a deposit in court. The decree was for over $300,000, and the judge following the usual practice required a bond in double the amount of the decree. The defendants, as security for the claim, had deposited in the court below government bonds to the amount of $200,000. On a motion in this court to reduce the amount of the bond, the court reduced it to $225,000. Chief Justice Chase, delivering the opinion of the court, said: "It is not required that the security shall be in any fixed proportion to the decree. What is necessary is, that it be sufficient."

From the amount involved in this case, and the eminence of the counsel engaged in it, it was no doubt carefully considered. After its determination, the court made a general rule as to the amount of indemnity required in *supersedeas* bonds, which now stands as the 29th Rule of the court. This rule declares that "such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including 'just damages for delay' and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages; or where the property is in the custody of the marshal, under admiralty process, as in case of capture or seizure; or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in

all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and 'just damages for delay,' and costs and interest on the appeal."

Since the adoption of this rule, the matter has come up for consideration in several cases. In *French* v. *Shoemaker*, 12 Wall. 86, where the matter in controversy was the possession of a railroad, the interest of the defendant in which had been pledged as security for $5,000, and which was in the hands of a receiver, upon a decree for the complainant, and an appeal, the bond taken for a *supersedeas* was in the penalty of $500; and this court, after reciting the rule, held that nothing appeared to show that the bond was insufficient.

In *Jerome* v. *McCarter*, 21 Wall. 17, an appeal was taken from a decree of over a million of dollars for the foreclosure and sale of a canal, subject to a prior lien of over a million and a half of dollars. The canal company had become bankrupt, and the assignees in bankruptcy brought the appeal. The appeal bond required of them was $10,000; and motion was made in this court to have the amount of security increased. The court after reviewing the previous cases, and adverting to the 29th Rule, refused the motion, holding that the amount of security in such a case was in the discretion of the judge who took the bond, and that this court would not interfere with that discretion, unless there had been a change of circumstances requiring additional security. The Chief Justice said: "This is a suit on a mortgage, and, therefore, under this Rule, a case in which the judge who signs the citation is called upon to determine what amount of security will be sufficient to secure the amount to be recovered for the use and detention of the property, and the costs of the suit, and just damages for the delay, and costs and interest on the appeal. All this, by the rule, is left to his discretion." It being contended that the judge had disregarded the established rule, to require security for the interest accruing pending the appeal, which in that case would amount on the debt due to the complainant and on the prior liens, to more than half a million of dollars; the court held that this is not the requirement of the rule; that the object is to provide indemnity for the loss by the accu-

mulation of interest consequent upon the appeal, not for the payment of the interest: and that, as to this, the judge must determine. It was added, that the decree did not interfere with an action at law against the company, if it were not bankrupt, nor with proving the claim in bankruptcy, and obtaining a dividend, since it was bankrupt.

So far as the point decided in this case goes, it determines that, on an appeal from a decree for the foreclosure of a mortgage, the appeal bond is not intended as security for either the amount of the decree or the interest accruing pending the appeal, but for such damages as may arise from the delay incident to the appeal; and although it is intimated that this damage may depend upon the use and detention of the mortgaged property, yet that was not the point in judgment.

In *Ex parte French*, 100 U. S. 1 (an ejectment case), the bond being amply sufficient to cover the damages, or mesne profits, recovered in the court below, this court refused to interfere, by a *mandamus*, to compel the court below to proceed to execution. The Chief Justice said: "In this view of the case, the bonds are sufficient in amount and form. So far as the money parts of the judgment are concerned, they are far in excess in each instance of the amount recovered against the several defendants who seek the stay; and as to the damages on account of the detention of the property, we decided in *Jerome* v. *McCarter*, that the amount of the bond rested in the discretion of the judge or justice who signed the citation, or allowed the *supersedeas*, and would not be reconsidered here."

In this case the court did look to see whether the bond was sufficient to cover the mesne profits or damages recovered below; but declined to examine into its sufficiency to secure the mesne profits accruing pending the proceedings in error, leaving that to the discretion of the judge. The case decides nothing as to whether such mesne profits would be recoverable under the bond or not. By the English statute of 16 & 17 Car. II., c. 8, as we have seen, they would be so recoverable; but in *Roberts* v. *Cooper*, before cited, it was held that our statute does not provide for the case.

The last case to which we shall refer is *Supervisors* v. *Kennicott*, 103 U. S. 554. There the county whereof the plain-

tiffs in error were supervisors had given a mortgage upon its swamp lands to secure an issue of bonds by the Mount Vernon Railroad Company. This mortgage was foreclosed, and the lands were decreed to be sold to raise the amount due, which was ascertained by the decree. The county appealed, and a *supersedeas* bond of $40,000 was required to be given. The decree being affirmed by this court, a suit was brought on the appeal bond, and judgment was given against the county for the whole penalty. The judgment was brought here by writ of error, and reversed on the ground that no damages had been shown which could be recovered on the bond. The damages set up by the plaintiffs were: 1, the interest on the debt which accrued pending the appeal, which exceeded the penalty of the bond; 2, the balance of the debt which remained unsatisfied after the lands were sold, which largely exceeded the bond. We held that neither of these items could properly be assigned as damages within the meaning of the condition of the appeal bond. In that case, as was observed by the court, no claim was made for the use and detention of the lands pending the appeal, except in the way above stated. The debt was not the debt of Wayne County, and no damage could have resulted from the stay of execution except the delay in the sale, as no personal judgment could have been rendered against the county for the debt, and of course no execution could have been issued against it.

This case does not decide the precise question now before us, because there was no party before the court who was personally liable for the debt, and no claim was made for intermediate rents and profits, or for use and detention of the land.

In view of the authorities, therefore, as far as they go, if the bond in the present case is to be regarded as importing nothing more than the bond prescribed by the statute, it is clear that it did not operate as security for the original decree, nor for the interest which accrued pending the appeal, nor, by consequence, for the balance of these amounts, or either of them, after applying the proceeds of the mortgaged property. The item of $530 costs unpaid by the defendants in the original foreclosure suit come under the same head, being part of the original decree, to pay which the lands were ordered to be

sold. The only ground of recovery upon the bond could be: 1, the depreciation of the property in market value pending the appeal; or, 2, its deterioration by waste, or want of repair, or the accumulation of taxes or other burdens; or, 3, the use and detention of the property pending the appeal, that is, the rents and profits; or, 4, the non-payment of the costs of the appeal, which accrued in this court; but the special verdict does not find that these costs were unpaid.

If depreciation in market value can ever be laid as cause of legal damages on a bond in error (which we greatly doubt), it cannot be done in this case, because it is found by the special verdict that the property considerably increased in value pending the appeal. Deterioration by waste, &c., is a very different matter; but that is equally out of the question in this case, as no deterioration is shown. The defendants paid the taxes and insurance, and kept the property in repair. The principal question for consideration, therefore, is, whether the plaintiffs were entitled to recover the rents and profits, or damages for the use and detention, as it is otherwise called.

We have seen that even in ejectment it has at least been questioned by this court whether the bond in error covers rents and profits accruing pending the writ. And yet there is a material difference between the case of ejectment and a suit for the foreclosure of a mortgage.

The difference is this: in ejectment the property of the land is in question, and if the plaintiff has the right, he is entitled to immediate possession and to the perception of the rents and profits, which belong to him, and for which the defendant in possession is accountable to him. Every dollar, or dollar's worth, is so much of the plaintiff's property of which he is deprived. And the same is true in dower. But in the case of a mortgage, the land is in the nature of a pledge; and it is only the land itself — the specific thing — which is pledged. The rents and profits are not pledged: they belong to the tenant in possession, whether the mortgagor or a third person claiming under him. This is not only the common law, but it is the express statute law of Nebraska, which declares that, "in the absence of stipulations to the contrary, the mortgagor retains the legal title and right of possession." The plaintiff, in this

case, was not entitled to possession, nor to the rents and profits. His foreclosure suit did not seek possession, but sought a sale of the specific thing, — the land. In such a case, until the litigation is ended, it doth not appear that there must be a sale, or even that the plaintiff is entitled to a sale. The defendant in possession is entitled to redeem the land until a sale is made, and until then he is entitled to the rents and profits, which belong to him as of right. The taking of the rents and profits prior to the sale does not injure the mortgagee, for the simple reason that they do not belong to him. Waste, that is, destruction or injury to the land itself, as before stated, is an injury to the mortgagee. It diminishes the value of the pledge; and for such injury no doubt he might recover on the appeal bond. Other deteriorations, such as occur by want of repairs, accumulation of taxes, fires not covered by reasonable insurance, and the like, probably might also be fairly covered by the bond. But perception of rents and profits is the mortgagor's right until a final determination of the right to sell, and a sale made accordingly.

The mere delay of the sale for the purposes of an appeal does not operate to the legal injury of the mortgagee. It does not suspend execution for the debt; he has no right to such an execution by the decree of foreclosure and sale. It is not a decree against the person, and cannot be enforced by an execution against goods and lands generally. It is simply a decree for the sale of the land mortgaged, in order that the proceeds may be applied to the debt. The amount due is ascertained by the decree, it is true, but only for the purpose of determining the amount of charge on the land. The debt may be prosecuted by a personal action against the debtor, and this may be the defendants in the suit, or some other person. The rule of court by which a personal decree may, in some cases, be entered up against the mortgagor for the residue of the debt, after the proceeds arising from the sale of the land have been applied, is a recent rule intended to obviate the necessity of a separate action. It has not changed the essential nature of the decree for foreclosure and sale.

It often happens that the debt is not fully ascertained when a decree for sale and foreclosure is made; as where there are

many outstanding bonds which have to be called in and verified. The sale in such cases is frequently made in advance, and the proceeds brought into court for distribution amongst those who may appear to be entitled thereto; all which shows that a decree of foreclosure is a very different thing from a personal decree or judgment for the debt.

As it is the specific thing, the land itself, and not the rents and profits, that constitutes the pledge, the delay of sale caused by the appeal, as before said, deprives the mortgagee of no legal right. It may be an incidental disadvantage or inconvenience, but in our judgment it is not a legal damage contemplated by the appeal bond. We are aware that a contrary view has sometimes been taken at the circuit; but upon a full consideration of the subject, we have come to the conclusion now expressed. The chances of actual deterioration and waste in certain classes of property are so great, that a bond in considerable amount may well be required, and if actual deterioration and waste supervenes, the amount may properly be recovered.

In addition to these general considerations, a careful examination of the 29th Rule will show that in cases like the present it does not, in terms at least, contemplate security for the use and detention of the property pending the appeal. The words are, "indemnity in all such cases [where the property in controversy necessarily follows the event of the suit] is only required in an amount sufficient to secure the sum *recovered* for the use and detention of the property, and the costs of the suit, and just damages for delay," &c. "The sum recovered for use and detention," here referred to, means the sum recovered in the original judgment or decree, such as damages and mesne profits in ejectment, damages in dower, and replevin, &c., and the phrase "just damages for delay" refers to those damages arising from the delay occasioned by the proceedings in error or appeal, which are properly a legal damage to the party delayed. We are thrown back, therefore, to a consideration of the nature of the particular case, to ascertain what those legal damages properly are. The words "use and detention" do not assist us, as they relate to a cause of recovery in the original judgment.

There is another consideration which relieves the conclusion which we have reached from any supposed hardship or injustice to mortgagees. Courts of equity always have the power, where the debtor is insolvent, and the mortgaged property is an insufficient security for the debt, and there is good cause to believe that it will be wasted or deteriorated in the hands of the mortgagor, as by cutting of timber, suffering dilapidation, &c., to take charge of the property by means of a receiver, and preserve not only the *corpus*, but the rents and profits for the satisfaction of the debt. When justice requires this course to be pursued, and it is resorted to by the mortgagee, it will give him ample protection. There is no necessity, therefore, in order to protect him from injury, that a party, in order to have the benefit of an appeal, should be obliged to give security to account for the intermediate rents and profits of his own property.

We have devoted so much space to a consideration of the principal question, that we must dismiss the other point in a few words. The plaintiffs contend that the bond in terms requires the defendant to respond for the "use and detention" of the property covered by the mortgage during the pendency of the appeal. As the judge had no authority to require such a condition to be inserted in the bonds, and probably was not aware of its insertion in this case, and as a party ought not to be deprived of his right of appeal upon the terms which the law prescribes, we should be very reluctant to hold that this was a voluntary bond, knowingly entered into beyond the requirements of the statute. We should rather hold that it was drawn by attempting to copy the words of the 29th Rule, instead of following the statute, and inadvertently omitting the connecting words. As an appeal bond, or bond in error, is a formal instrument required by the law, and governed by the law, and has, by nearly a century's use, become a formula in legal proceedings, with a fixed and definite meaning, and as the important right of appeal is greatly affected by it, we think that it is not allowable, in practice, by a change in its phraseology, to give to it an effect contrary to what the statute intended. It would be against the policy of the law to allow such deviations and irregularities to creep in. We think the

rule followed in some of the States is a sound one, that if the condition of an appeal bond, or bond in error, substantially conforms to the requisitions of the statute, it is sufficient to sustain it, though it contain variations of language; and that if further conditions be superadded, the bond is not therefore invalid, so far as it is supported by the statute, but only as to the superadded conditions. See *Sanders* v. *Rives*, 3 Stew. (Ala.) 109; *Gardener* v. *Woodyear*, 1 Ohio, 170.

We are aware, as shown by the citations on the plaintiffs' brief, that official bonds, and bonds given to the government for the purpose of enjoying certain offices or privileges, and perhaps some others subject to like reason, have often been sustained as contracts at common law, voluntarily entered into, where they have not conformed to the statutory requirements, and would have been insufficient and ineffectual for the purposes of a recovery, if those requirements had been applied to them. We do not think that this case fairly belongs to that class of cases. Had the bond now under consideration so entirely departed and varied from the statute that it could not have been sustained with the effect of an ordinary appeal bond, the question would then more properly have arisen, whether, on the one hand, it might not be sustained as a bond at common law, or, on the other, declared utterly void.

Our conclusion is, that no damage or cause of action appeared by the verdict of the jury which could authorize a judgment for the plaintiffs.

Judgment reversed, and cause remanded with instructions to render judgment for the defendants below.

MR. JUSTICE MILLER, with whom concurred MR. JUSTICE FIELD, dissenting.

The decision of the court, with the grounds on which it is based in this case, is so wide a departure from the former practice in similar cases, and is likely to work so much injustice in future, that I feel it to be my duty to dissent, and to give the reasons for it.

I am at a loss to see the value of the learned search into the practice and precedents of the English law in writs of error and appeals, and deem it only necessary to say that in our

system the right to a writ of error or to an appeal depends wholly upon statutes granting that right, and not upon any principle of the common law, or upon any power in any court to review the decisions of any other court which is not also the creation of positive statute, and which in the courts of the United States must necessarily depend upon an act of Congress. So, also, the mode of exercising this right, the conditions on which the writ or the appeal may be had, and its effect on the progress of the case, are all prescribed by statute.

A striking illustration of this is in the fact that in the English courts a writ of error sued out or an appeal once allowed, transferred the case itself, its record, and all proceedings under it, into the reviewing tribunal, and left nothing in the inferior court on which it could act. The acts of Congress proceed upon a wholly different principle. They allow a party to take an appeal or bring a writ of error, but neither proceeding removes the record into the appellate court, as the case may be heard there upon the *transcript* of the record, the original remaining in the inferior court.

Unless the plaintiff in error or the appellant takes the other step which the law prescribes, the court which rendered the judgment complained of can proceed to execute its judgment or its decree, though the case be pending in the appellate court. In fact, unless the other step mentioned be taken, a valid sale of his property may be made at the very moment when the appellate court is deciding to reverse the judgment or the decree on which it is sold.

This other step, then, which the party appealing may take, and thereby totally suspend the power of the inferior court to proceed, is wholly and absolutely statutory. It is here for consideration in this case, and should be decided alone on the language and meaning of the statute.

This step is the giving of a bond which, because it has the effect of suspending the action of the inferior court, is called a *supersedeas* bond, in analogy to the effect of a writ of *supersedeas* in the English law from the superior to the inferior court.

The law of this subject is found in sect. 1000 of the Revised Statutes: "Every justice or judge signing a citation or any

writ of error, shall, except in cases brought up by the United States, or by direction of any Department of the Government, take good and sufficient security that the plaintiff in error, or the appellant, shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a *supersedeas* and stays execution, or all costs only where it is not a *supersedeas* as aforesaid." As thus stated in the Revision, the law is the result of sect. 22 of the act of Sept. 24, 1789, c. 20, as amended by the act of Dec. 12, 1794, c. 3.

It has never been doubted that under these acts the appealing party could have his election to make his writ of error operate as a *supersedeas* or not, and that the amount of security to be given would depend very much on this choice. If he did not wish to stay execution, he was only required to secure payment of the costs of the appeal. If he did wish to stay execution, he must give bond to answer *all* damages as well as costs, so that both the condition of the bond to be given and the amount of it must depend on the effect it had on further proceedings in the inferior court.

The decisions of this court, and the practice of the judges under it, are given with reasonable accuracy in the opinion of the majority, from the date of the last of these acts until the adoption of Rule 29 of this court in 1867. *Rubber Company* v. *Goodyear*, decided in that year, 6 Wall. 153, and some previous cases, had shown great oppression in exacting security in an excessive amount to stay execution in cases where but little damage could accrue to the appellee, because, as in case of proceedings *in rem*, where there was no personal liability, and there could be no loss except from the delay, and in cases of mortgage foreclosures, where there could be no other decree but for a sale of the property. The result was the adoption of that rule, in which the court undertook to define what damages were allowable in the various classes of cases where the plaintiff in error or the appellant obtained a stay of execution or *supersedeas* pending the appeal. This rule was intended for the guidance of the judges whose duty it was to approve bonds in appeals or writs of error. It was the construction of the members of the court of that day as to the damages which, in the

various kinds of cases mentioned in it, the party who had obtained a *supersedeas*, and had failed in his appeal, was liable under the act of Congress to pay for his false clamor to the party whom he had unjustly delayed after final judgment against him, for only final judgments can be reviewed in this court.

Of the justices who participated in framing that rule, in which all acquiesced, but two remain, and neither of them concurs in the construction now given to it by the majority of the court, nor in the construction of the statute under which it was framed.

In the case before us the bond sued on was given to suspend an order of sale in a suit to foreclose a mortgage, and the question is, whether the bond, which is substantially conformable to the rule of the court, covers the rental value of the mortgaged property during the three years of delay while the case was pending in this court. The property was sold for a sum much below the amount of the debt, for the payment of which it was decreed to be sold. During all that time the mortgagor was in possession. The property was a public hotel, and the jury find the rent was worth $38,241.75.

The opinion of the court is based upon two propositions: 1. That the mortgagor had a right to the use and occupation, even after condition broken, until judicial sale, and was not bound to the mortgagee for their value. 2. That the rule does not make any provision for rent pending the appeal.

I do not agree to either proposition. The mortgagor, after condition broken, has no right in law or equity to the possession of the mortgaged property, unless it be so expressed in the mortgage. If it be personal property, it is every-day practice for the mortgagee, after condition broken, to seize the goods and chattels and hold them until the debt be paid, or to sell them in satisfaction of the debt. If the mortgagor refuse to deliver possession on demand, the mortgagee can recover it by replevin; and this is often done. How could this be so if the mortgagor's right to possession remained after condition broken?

If the mortgaged property be real estate, the common law allowed the mortgagee an action of ejectment after condition broken. This was formerly the usual mode of foreclosure, and

is retained in many States to this day. How can there be any right in the mortgagor to possession when this right to recover by an action of ejectment belongs to the mortgagee? The two rights are inconsistent and cannot coexist. It is conceded that in such a case as the present one, where the mortgaged property is insufficient to pay the debt, the mortgagee has the additional equitable right to have a receiver appointed to take possession, and in the end, if necessary, the rents and profits will be appropriated to pay the deficiency. How can all this be done if the mortgagor has the right to continue in possession after he has broken the condition of his mortgage?

The truth is, the idea has obtained footing in practice because it is easier to get a decree and sell the property than to dispossess the mortgagor, and hence attempts to do so are rare. But when the mortgagee has pursued the former course and obtained his order of sale, — a decree which is final, for no other decree can be appealed from, — this right of the defaulting mortgagor to further possession of the property, while he transfers the litigation to another court and protracts it for three years, is an inequitable abstraction, founded neither in the common-law rights of the parties nor in any principle of equitable jurisprudence. The whole error is founded on the idea that so long as the mortgagor is *permitted* to retain possession he is not accountable for rent, and not upon the existence of any *right* to retain possession.

And so the act of Congress says, If you wish to appeal this case to another court and go through another trial, instead of appointing a receiver to take possession, we will require of you a bond to secure all damages suffered by the appellee by reason of the delay; and as he is entitled to have the land sold at once for his debt, or to have possession delivered so that rents and profits may be appropriated where they ought to go, you can only suspend the operation of the decree by giving such a bond.

If this be not so, the grossest injustice must result in many cases. In all cases of insolvent mortgagors the rule, as construed by the court, offers a strong inducement to keep the mortgagee out of his money as long as possible, without interest, or any other compensation for the delay. An insolvent

corporation — a railroad company, for instance, — makes default in its mortgage bonds, which amount to twice the value of the property mortgaged. A decree is obtained for its sale, and before a receiver can be appointed the directors take an appeal, give a small bond, little more than the probable costs, and then use the road for three years, making millions of dollars out of it with which to pay debts subsequent to the mortgage, or distribute among interested parties. No more striking instance of its injustice is needed than the case before us. A decree for money largely in excess of the value of the hotel mortgage is stayed by a bond for $50,000, under which the defendant, an utterly insolvent corporation, receives rent, or uses the property to the value of $38,000, while it litigates, without a shadow of right, in this court for three years, and appropriates this $38,000 to its own use, and is not held responsible for this, though the bond expressly mentions "*the use and detention*" of the property as one of the liabilities incurred, if the corporation fails to make good its plea.

But, it is said, the rule only provides for the use and detention of the property, before the decree, which is appealed from. The language of the rule is, that in such cases, mentioning mortgage foreclosure suits specifically, "indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and occupation of the property, and the costs of the suit and 'just damages for delay,' and costs and interest on the appeal." That the use and detention here spoken of, like all the other classes of damages there mentioned, are such as may thereafter be recovered, is as plain as that the delay and the costs and interest are such as follow, and not such as precede, the decree. It is senseless, without it meant this, and such has been the practical construction since its adoption.

Not only is this true in practice, but in the leading case, construing this rule for the first time, of *Jerome* v. *McCarter*, 21 Wall. 17, the Chief Justice expressly held that the rent mentioned in the rule is that accruing after the appeal.

That was an appeal from a foreclosure decree and a motion for additional security in this court. Mr. Phillips, for appellant, in support of the sufficiency of the bond, cited *Roberts* v. *Cooper* to show that nothing could be recovered for

the use and detention of the property. But the Chief Justice, after citing the rule verbatim, said: "This is a suit on a mortgage, and therefore, under this rule, a case in which the judge who signs the citation is called upon to determine what amount of security will be sufficient to secure the amount to be recovered for the use and detention of the property, and the costs of the suit, and just damages for the delay, and costs and interest on the appeal."

Here is a construction of the rule by a unanimous court in a case where the precise question was presented.

The decision of the court in this case overrules it, and establishes in its place a rule which, in many cases, must work injustice, and in no case is equitable; for, in the language of that rule, leaving out the words "use and detention," this is a necessary part of the other words, "just damages for the delay."

HAHN v. UNITED STATES.

A. was surveyor of customs from June 13, 1872, to May, 1876, at Troy, N. Y., which was a port of delivery, but not of entry, in the collection district of the city of New York. At various times during the period from June 13, 1872, to June 22, 1874, there was a surveyor of customs at the port of New York, which was a port of entry, and there were surveyors of customs at two other ports in that district, which were ports of delivery and not ports of entry. In accordance with the uniform practice of the Treasury Department, under sect. 1 of the act of March 2, 1867, c. 188, repealed by sect. 2 of the act of June 22, 1874, c. 391, the Secretary of the Treasury distributed to the collector, naval officer, and surveyor at the port of New York, as such officers, and not as informers or seizing officers, one-fourth part of the proceeds of the fines, penalties, and forfeitures incurred at the port of New York between June 13, 1872, and June 22, 1874. A. made no question in regard to this practice until March, 1874, and when informed, in June of that year, that the department adhered to its construction of the act, he made no further complaint until March, 1877. He sued the United States in the Court of Claims in May, 1877, claiming that under said first section he was entitled to share in said one-fourth equally with the collector and the naval officer at the port of New York, and all the surveyors in the district. The court rejected the claim. *Held*, that the judgment was not erroneous.

APPEAL from the Court of Claims.

The case is stated in the opinion of the court.

Mr. Halbert E. Paine for the appellant.
The Solicitor-General for the appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This case comes before this court on an appeal by the claimant, Emanuel Hahn, from the judgment of the Court of Claims finding in favor of the United States and dismissing the petition of the claimant. The following are the material facts found by that court: "1. On the 13th of June, 1872, the claimant was appointed surveyer of customs at the port of Troy, N. Y., and continued to act as such officer until May 28, 1876. 2. During that period, from June 13, 1872, to June 22, 1874, Alonzo B. Cornell was surveyor of customs at the port of New York to March 31, 1873, and George H. Sharpe from March 31, 1873, to June 22, 1874; Isaac N. Keeler was surveyor of customs at the port of Albany; and from April 28, 1874, Frank P. Norton was surveyor of customs at the port of Port Jefferson; all in the collection district of the city of New York. 3. There was collected and paid into the treasury of the United States, from the proceeds of fines, penalties, and forfeitures incurred at the port of New York, between June 13, 1872, and April 28, 1874, the sum of $839,819.40, and more, and between April 28 and June 22, 1874, $14,604.11, and more, after making the deductions required by law; of which sums, in the distribution made by the Secretary of the Treasury, one-fourth part was paid to the collector, naval officer, and surveyor at the port of New York, as such officers, and not as informers or seizing officers, and none thereof was paid to the claimant, which distribution was made in accordance with the uniform practice of the Treasury Department, under the law of March 2, 1867, c. 188 (14 Stat. 546). 4. During the same period, between June 13, 1872, and June 22, 1874, there was paid into the treasury, from fines incurred at the port of Troy aforesaid, on persons for not surrendering licenses of canal-boats as required by law, the sum of $1,000, of which, in the distribution thereof by the Secretary of the Treasury, one-fourth was paid to the claimant as informer or seizing officer, and no other share was allowed to him." On these facts the

claimant contends that under the provisions of sect. 1 of the act of March 2, 1867, c. 188, he was entitled, for the period from June 13, 1872, to April 28, 1874, to share equally with the collector, the naval officer, and two other surveyors in the collection district of the city of New York in the one-fourth part of the said sum of $839,819.40, and thus to recover one-twentieth part of said sum, and for the period from April 28, 1874, to June 22, 1874, to share equally with the collector, the naval officer, and three other surveyors in said collection district, in one fourth part of said sum of $14,604.11, and thus to recover one twenty-fourth part of said sum.

The statute in question is in these words: "That from the proceeds of fines, penalties, and forfeitures incurred under the provisions of the laws relating to the customs, there shall be deducted such charges and expenses as are by law in each case authorized to be deducted; and in addition, in case of the forfeiture of imported merchandise of a greater value than $500 on which duties have not been paid, or in case of a release thereof, upon payment of its appraised value, or of any fine or composition in money, there shall also be deducted an amount equivalent to the duties in coin upon such merchandise (including the additional duties, if any), which shall be credited in the accounts of the collector as duties received, and the residue of the proceeds aforesaid shall be paid into the Treasury of the United States, and distributed, under the direction of the Secretary of the Treasury, in the manner following, to wit: one-half to the United States; one-fourth to the person giving the information which has led to the seizure, or to the recovery of the fine or penalty, and if there be no informer other than the collector, naval officer, or surveyor, then to the officer making the seizure; and the remaining one-fourth to be equally divided between the collector, naval officer, and surveyor, or such of them as are appointed for the district in which the seizure has been made, or the fine or penalty incurred, or, if there be only a collector, then to such collector."

The findings in this case show, 1, that the moneys claimed were the proceeds of fines, penalties, and forfeitures incurred at the port of New York; 2, that the claimant was not the surveyor at that port, but was surveyor at another port in the

same collection district; 3, that the Secretary of the Treasury actually distributed one-fourth part of the distributable sums to the collector, naval officer, and surveyor at the port of New York, as such officers, and not as informers or seizing officers, and paid no part to the claimant; and, 4, that such distribution was made in accordance with the uniform practice of the Treasury Department, under the said act of 1867. From these findings it is to be understood that it was the uniform practice of the Treasury Department, under the act of 1867, to distribute one-fourth part of the proceeds of fines, penalties, and forfeitures incurred at the port of New York (such as the proceeds in this case were) to the collector, naval officer, and surveyor at that port, as such collector, naval officer, and surveyor, such one-fourth part not including any part of any share which under said statute goes to the informer or to the officer making the seizure. The demand made by the claimant in this case in his petition has no reference to the one-fourth part which the statute awards to the informer or the seizing officer.

The controversy arises over the meaning of these words in the act of 1867: "The remaining one-fourth to be equally divided between the collector, naval officer, and surveyor, or such of them as are appointed for the district in which the seizure has been made, or the fine or penalty incurred." It is said, in substance, in the opinion of the Court of Claims in this case, reported in 14 Ct. of Claims Rep. 305, that the Secretary of the Treasury, in the practice spoken of, proceeded on the view that the port of New York was the only port of entry in said collection district; that the ports of Albany, Troy, and Port Jefferson, though ports in said collection district and ports of delivery, were not ports of entry; that the statute spoke only of "the collector, naval officer, and surveyor;" that the words "or such of them as are appointed for the district in which the seizure has been made, or the fine or penalty incurred," could not enlarge the meaning of the word "surveyor" to the plural sense, because it could not so enlarge the meaning of the word "collector" or the words "naval officer," as there was but one of each of them in any district; and that the surveyor intended, in reference to cases like the present, was the surveyor of the port where the fines, penalties, and forfeitures

were incurred. The court observed that, as the provisions of the act of 1867 awarding shares of forfeitures had been repealed by sect. 2 of the act of June 22, 1874, c. 391, and as Congress had not interfered with such construction by the Secretary of the Treasury while the act was in force, and as the claimant had raised no question in regard to such construction until March, 1874, and had been informed by the Treasury Department in June, 1874, that it adhered to such construction, and had not complained again until March, 1877, but had permitted moneys to be distributed under such view, until he brought this suit in May, 1877 (facts which appear in the findings of the court below), the construction adopted had become the one which must govern all distributions under the act. The court added, that such construction did not appear to it unreasonable, and might well have been reached in the exercise of a sound judgment, and that, regarding the statute as ambiguous, all the circumstances of the case were such as to justify the application of the principle of interpretation sanctioned by this court in *United States* v. *Pugh*, 99 U. S. 265, that, "in the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect, *Edwards' Lessee* v. *Darby*, 12 Wheat. 210," and where this court refused to interfere with such construction after it had been acted upon for a long time. See also *United States* v. *Alexander*, 12 Wall. 177; *Peabody* v. *Stark*, 16 id. 240; *Smythe* v. *Fiske*, 23 id. 374; *United States* v. *Moore*, 95 U. S. 760.

We are satisfied with the decision of the Court of Claims, and with the grounds above stated as assigned by it therefor, and its judgment is

Affirmed.

CAMPBELL v. UNITED STATES.

A party who, under sect. 4 of the act of Aug. 5, 1861, c. 45, is entitled to the drawback there mentioned may, when payment thereof has been refused, maintain a suit therefor in the Court of Claims against the United States.

APPEAL from the Court of Claims.

The case is stated in the opinion of the court.

Mr. Joseph H. Choate and *Mr. William M. Evarts* for the appellants.

Mr. Assistant Attorney-General Maury for the United States.

MR. JUSTICE MILLER delivered the opinion of the court.

The fourth section of the act of Aug. 5, 1861, c. 45, reads as follows: "That from and after the passage of this act there shall be allowed, on all articles wholly manufactured of materials imported, on which duties have been paid, when exported, a drawback equal in amount to the duty paid on such materials, and no more, to be ascertained under such regulations as shall be prescribed by the Secretary of the Treasury: *Provided*, that ten per centum on the amount of all drawbacks so allowed shall be retained for the use of the United States by the collectors paying such drawbacks respectively."

On the 22d of January, 1862, the Secretary established such regulations as he deemed appropriate, the first of which is this: —

"To entitle the exporter to such allowance of drawback, he must, at least six hours previous to the putting or lading any of the articles intended to be exported by him for benefit of drawback on board any vessel or other conveyance for exportation, lodge with the collector of customs for the district from which such exportation is to be made, an entry setting forth his intention to export such articles, and the marks, numbers, and a particular description of the same, with their quantity and value, and designating the manufacturer thereof, the place where deposited, the name of the vessel or other conveyance in or by which, and the port or place to which the same are intended to be exported, and also describing in such entry the material or materials severally from which he claims the arti-

cles to have been manufactured, designating when, where, whence, by whom, and in what vessel or other conveyance the same was or were imported, and specifying the quantity and value thereof used in the manufacture. This entry shall, upon presentation, be verified by the oath or affirmation of the proprietor and the foreman of the manufactory in which such articles were made."

Other regulations require the collector and the surveyor to make the necessary examination to ascertain if the articles described in this entry be as stated, and to mark and designate them accordingly, and to verify the weight, gauge, measure, or amount, and to superintend the lading for export, &c.

All this having been done, and the oath of the exporter and his bond, with condition prescribed by the rules, being given, the collector is to give a certificate of the amount to which the party is entitled as drawback, on which he is to receive the money.

George W. Campbell and George A. Thayer, survivors of Ludlow D. Campbell, deceased, sued in the Court of Claims for a drawback on account of large amounts of linseed cake made by them out of linseed imported from a foreign country, and which cake they exported to London.

Their petition was dismissed by that court, on the ground, as stated in their opinion, that it was not a case of which they had jurisdiction.

The court, however, did entertain jurisdiction of the case; an answer was filed on behalf of the United States denying the allegations of the petition, testimony was taken, and a full and elaborate finding of facts was made, and on this, the court, as a conclusion of law, find that for want of jurisdiction of the subject-matter the petition is dismissed.

This finding of facts shows that in the months of September, October, November, and December, 1870, claimants imported from Calcutta large quantities of linseed, for which they paid the duty of sixteen cents per hundred pounds according to law, which was by them, without intermixture with any other linseed or other material, manufactured into linseed oil and linseed cake, of the latter of which article there was produced therefrom 5,156,585 pounds.

It was for the exportation of part of this latter product that the drawback is claimed in this suit. As, however, this was done by several shipments at different times, and as the finding of facts is precisely the same in the case of each shipment, except as to date, quantity, and the name of the vessel, we give here verbatim the finding as to the first: —

"On the nineteenth day of January, 1871, the claimants and said Ludlow D. Campbell were the owners of and had in their possession 447,712 pounds of linseed cake, being parcel of the aforesaid 5,156,585 pounds, and desiring and intending to export the same from New York to London for the benefit of the drawback authorized by the fourth section of the 'Act to provide increased revenue from imports to pay interest on the public debt, and for other purposes,' approved August 5, 1861, duly presented to and lodged with the collector of customs for the port of New York, before putting or lading any of the said cake on board any vessel for exportation, an entry of said linseed cake for export by the ship 'Sterling Castle,' which was accompanied with the certificate and oath required by, and was in all respects in conformity with, the regulations prescribed by the Secretary of the Treasury, in pursuance of the requirement of the fourth section of said act, and the said claimants and said Ludlow D. Campbell in all respects conformed to such regulations in respect to drawback, which allowance had been by said regulations fixed at seventeen cents per one hundred pounds, and made payable by the United States thirty days after clearance of the vessel by which exportation was made, but the said collector, acting under instructions from the Secretary of the Treasury, given on the fifth day of December, 1870, wholly refused to perform or cause to be performed in any manner any other act than the receipt of said entry prescribed by said regulations to be done, or caused to be done, by a collector of customs under the said fourth section of said act.

"Thereafter, in the month of January, 1871, the said 447,712 pounds of linseed cake were shipped by the claimants and said Ludlow D. Campbell, on the said ship 'Sterling Castle,' which vessel, with said linseed cake on board, cleared at the custom-house at the port of New York for London on the thirtieth day of January, 1871, and said cake was thereupon exported and

carried by said vessel from New York to the port of London, in England, and there discharged and delivered, and no part thereof has been at any time relanded in any port or place within the limits of the United States."

The argument of counsel for the United States is, that until the officers of the customs comply with all the regulations of the Secretary of the Treasury, and the collector issues the drawback certificate, the law imposes upon the United States no obligation to pay anything for such drawback; that the law conferred upon the Secretary the right to make the regulations, and the collector the power to make the certificate for payment of drawback, and that the refusal of the collector to perform the duties imposed upon him preliminary to making his certificate, and then refusing the certificate, totally defeats the claim of the party, who, by the law, is guaranteed a right to his drawback, and who has complied with all that the law requires of him to secure and enforce it. To the same effect is the opinion of the Court of Claims.

It would be a curious thing to hold that Congress, after clearly defining the right of the importer to receive drawback upon subsequent exportation of the imported article on which he had paid duty, had empowered the Secretary by regulations, which might be proper to secure the government against fraud, to defeat totally the right which Congress had granted. If the regulations of themselves worked such a result, no court would hesitate to hold them invalid as being altogether unreasonable.

But the regulations in this case are not unreasonable, nor do they interpose any obstacle to the full assertion and adjustment of plaintiffs' right. It is the order of the Secretary of the Treasury forbidding the collector to proceed under these regulations or in any other mode, which is the real obstacle. Is that order a defence to this action? Can the Secretary, by this order, do what he could not do by regulations, — repeal or annul the law? Can he thus defeat the law he was appointed to execute, by making regulations, and then, by ordering his officers not to act under them, and not to act at all, place himself above the law and defy it?

We think the Court of Claims has jurisdiction of such a claim: 1. Because it is founded on a law of Congress; and, 2.

Because the facts found in this case raise an implied contract that the United States will refund to the importer the amount he paid to the government.

The finding of the court is that, by the regulations, this allowance of drawback had been fixed at seventeen cents per hundred pounds.

The act of Congress having declared that on exportation there shall be allowed a drawback equal in amount to the duty paid on such material, and the Secretary having established by a regulation that, as regarded the cake resulting from the manufacture of the linseed into oil and cake, the latter represents at seventeen cents per hundred pounds the duty on the imported seed so converted into cake, there resulted a contract that when exported the government would refund, repay, pay back, this amount as a drawback to the importer. If this be not so, it is because it is impossible to make a contract when the details of its *execution* or *performance* are left to officers who refuse to carry them out.

So it is equally clear that this claim is founded on the law allowing drawback.

The Court of Claims makes the mistake of supposing that the claim is founded on the regulations of the Secretary of the Treasury. This view cannot be sustained. It is the *law* which gives the right, and the fact that the customs officers refuse to obey these regulations cannot defeat a right which the act of Congress gives.

The second section of the act of Sept. 20, 1850, c. 84, entitled "An Act to enable the State of Arkansas and other States to reclaim the 'Swamp Lands' within their limits," declares: "That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid and transmit the same to the governor of the State, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent the fee-simple to said lands shall vest in the said State."

This duty was almost wholly neglected by the Secretary.

In the case of *Railroad Company* v. *Smith*, 9 Wall. 95, 99, it was insisted that the failure of the Secretary to act made

these lands subject to a grant for railroad purposes of a date subsequent to the swamp-land act. This proposition was thus answered by this court: "Must the State lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the State did not depend on his action, but on the act of Congress, and though the States might be embarrassed in the assertion of this right by the delay or failure of the Secretary to ascertain and make out lists of these lands, the right of the States to them could not be defeated by that delay. . . . Any other rule results in this, that because the Secretary of the Interior has failed to discharge his duty in certifying these lands to the State, they therefore pass under a grant from which they are excepted beyond doubt, and this when it can be proved by testimony capable of producing the fullest conviction, that they were of the class excluded from plaintiff's grant," that is, were granted to the State as swamp lands.

And in *French* v. *Fyan*, 93 U. S. 169, 173, the court, reaffirming *Railroad Company* v. *Smith*, said: "There was no means, as this court has decided, to compel him (the Secretary) to act; and if the party claiming under the State in that case could not be permitted to prove that the land which the State had conveyed to him as swamp land was in fact such, a total failure of justice would occur, and the entire grant to the State might be defeated by this neglect or refusal of the Secretary to perform his duty."

The application of this reasoning to the present case is too clear to need illustration.

It is an error to suppose that the officers of customs, including the Secretary, are in regard to this law created a special tribunal to ascertain and decide conclusively upon the right to drawback. Their function is entirely ministerial. They are authorized to pass upon no question essential to the claimant's right so as to conclude him in a court of competent jurisdiction. From the moment he presents his sworn entry, they simply ascertain quantities, identify and mark packages, accept bonds and sureties, and see that the exported article leaves the port in the ship. These and like duties being discharged, it is the collector's duty — a mere ministerial function — to give the

certificate of drawback. The amount of it is fixed at seventeen cents per hundred pounds by the regulation; he has nothing to do but to calculate the amount at that rate on the number of pounds shipped. He exercises no judicial or *quasi* judicial function. He concludes nobody's rights, and has no power to do so. The rights which the law gives cannot be defeated by his refusal to act, nor by his decision that no drawback was due.

Neither the act of Congress, nor any rule of construction known to us, makes the claimant's right, when the facts on which it depends are clearly established, to turn upon the view which the collector, or the Secretary, or both combined, may entertain of the law upon that subject, and much less upon their arbitrary refusal to perform the services which the law imposes on them.

A suggestion is made that the right to enforce the drawback in the court is affected by the fact that it is a gratuity.

It has never been supposed that there was a gratuity in all the cases where imports are free of duty. The purpose of the drawback provision is to make duty free, imports which are manufactured here and then returned whence they came or to some other foreign country, — articles which are not sold or consumed in the United States. The linseed in this case was bought abroad and imported for the purpose of being manufactured, and the product immediately sent out of the country. The drawback provision was simply a mode of making the linseed so imported and exported without distribution in the country duty free, and we see no gratuity in the case.

But if it were a free gift, it is not for the officers of the government to defeat the will of Congress on this subject by refusing to execute the law.

We are of opinion that the facts found by the Court of Claims establish the right of appellants to recover a judgment for the exported cake at the rate of seventeen cents per hundred pounds; *and the cause is remanded with directions to enter such a judgment.*

WOOD v. UNITED STATES.

The rank and pay of retired officers of the army are subject to the control of Congress.

APPEAL from the Court of Claims.

The case is stated in the opinion of the court.

Mr. Halbert E. Paine for the appellant.

Mr. Assistant Attorney-General Maury, contra.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an appeal from the Court of Claims. The claimant, Thomas J. Wood, was appointed to the office of colonel of the 2d Regiment of Cavalry, in the Army of the United States, in November, 1861, having been commissioned as a brigadier-general of volunteers in October, 1861. In December, 1862, while in command of the first division, left wing, of the 14th Army Corps, he was wounded at the battle of Stone River. In September, 1864, while in command of the third division of the 4th Army Corps, he was wounded at the battle of Lovejoy's Station, Georgia. These divisional commands were the commands of an officer of the rank of major-general, but he was not commissioned as a major-general of volunteers until January, 1865, nor brevetted as a major-general in the army until March, 1865.

Section 32 of the act of July 28, 1866, c. 299, provides as follows: "Officers of the regular army, entitled to be retired on account of disability occasioned by wounds received in battle, may be retired upon the full rank of the command held by them, whether in the regular or volunteer service, at the time such wounds were received." In January, 1868, General Wood was ordered, at his own request, to appear before a retiring board. In February, 1868, the board made the following finding: "The board is of the opinion that Brevet Major-General Thomas J. Wood, Colonel 2d United States Cavalry, is incapacitated for active service, and that said incapacity is the result of three wounds received in battle in the line of his duty,

while commanding a division of troops in the service of the United States." This finding was approved by the President, and by his authority and direction this order was issued from the Adjutant-General's Office, June 9, 1868: "Brevet Major-General Thomas J. Wood, Colonel 2d United States Cavalry, having, at his own request, been ordered before a board of examination, and having been found by the board to be physically incompetent to discharge the duties of his office on account of wounds received in battle, and the finding having been approved by the President, his name will be placed upon the list of retired officers of that class in which the disability results from long and faithful service, or some injury incident thereto. In accordance with sect. 32 of the act approved July 28, 1866, General Wood is, by direction of the President, retired with the full rank of major-general." General Wood accepted the rank of major-general on the retired list, as contained in said order, and received the pay of that rank from June 10, 1868, to March 3, 1875.

Section 1 of the act of March 3, 1875, c. 178, entitled "An Act for the relief of General Samuel W. Crawford, and to fix the rank and pay of retired officers of the army," provides that the retirement of General Crawford, as a colonel, for disability on account of a wound received in battle, shall be amended so that he shall be retired and be borne on the retired list of the army as a brigadier-general, "he having held the rank of a brigadier-general at the time he was wounded," his retired pay as brigadier-general to commence from the passage of the act. The second section provides as follows: "All officers of the army who have been heretofore retired by reason of disability arising from wounds received in action shall be considered as retired upon the actual rank held by them, whether in the regular or volunteer service, at the time when such wound was received, and shall be borne on the retired list and receive pay hereafter accordingly; and this section shall be taken and construed to include those now borne on the retired list placed upon it on account of wounds received in action." The section contains some exceptions, which it is not contended apply to the case of General Wood.

On the 23d of March, 1875, an order was issued from the

Adjutant-General's office, providing that, by direction of the President, and conformably to said act of March 3, 1875, the retired list of the army, under the heading, "Officers retired with the full rank of the command held by them when wounded, in conformity with sections 16 and 17 of the act of August 3, 1861, and section 32 of the act of July 28, 1866," is amended to fix the rank of the following named officers, from March 3, 1875, as below enumerated: Brigadier-generals, Thomas J. Wood (heretofore major-general), and two other major-generals; colonels, three brigadier-generals; lieutenant-colonels, two colonels; major, one colonel; mounted captain, one lieutenant-colonel; captains, two colonels; mounted first lieutenants, two mounted captains; first lieutenants, three captains, and one mounted first lieutenant; second lieutenant, one mounted second lieutenant.

There were seventy-three officers retired on the rank of the command held by them when wounded, under sect. 32 of the act of 1866. Of these, all but nineteen fell within the exceptions named in sect. 2 of the act of 1875. Of these nineteen, eight were restored to the rank on which they were originally retired, after the promulgation of the order of March 23, 1875. After March 3, 1875, General Wood received only the pay of a brigadier-general retired, $4,125 per year, the pay of a major-general retired during the same time having been $5,625 per year. In September, 1879, General Wood brought suit against the United States in the Court of Claims to recover the sum of $1,500 a year for four and a half years, as such difference in pay, claiming that he held the office of major-general on the retired list of the army by appointment of the President, by said order of June 9, 1868, and that Congress had no power to remove him from that office and appoint him to the office of brigadier-general on the retired list. The Court of Claims dismissed the petition on the merits. The view of that court was that, under the statutes of the United States in reference to the army, the office of an officer of the army and his rank are not necessarily identical; that the office has a rank attached to it, expressed by its title, when no other rank is conferred on the officer; that, the office remaining the same, the officer may have a different rank conferred on him, as a title of distinction,

to fix his relative position with reference to other officers as to privilege, precedence, or command, or to determine his pay; that, by sect. 1274 of the Revised Statutes, the pay of officers on the retired list of the army is determined by the rank upon which they are retired; that, by sect. 1094, the officers of the army on the retired list are a part of the army of the United States, and, therefore, no one can be upon that list who is not an officer appointed in the manner required by sect. 2 of art. 2 of the Constitution; that an officer of any grade, on the active list, thus appointed, may be retired with a different rank from that which belongs to his office, when Congress so provides; that this is not to appoint him to a new and different office, but is to transfer him to the retired list, and to change his rank, while he holds the same office; and that in connection with this change of rank his pay may be changed. These views appear to us to be sound. General Wood, holding the office of a colonel of cavalry in the army, his retirement with the rank of major-general, under the act of 1868, did not confer on him the office of major-general. He remained in the office of colonel of cavalry, and acquired a higher rank, and higher pay, as a retired officer. Such rank not being an office, Congress could change his rank, and with it his pay, as it did by the act of 1875. His actual rank when he was wounded was that of brigadier-general of volunteers, although the rank of the command which he then held was that of a major-general. The rank of his command when wounded was the test of rank and pay under the act of 1866, while his actual rank when wounded, whether in the regular or volunteer service, was the test of rank and pay under the act of 1875. Congress had the same right to change the claimant's rank and pay, by reducing them, that it had to change the rank and pay of General Crawford, by sect. 1 of the act of 1875, by increasing them, the standard in both cases being the actual rank held by the officer at the time he was wounded. The offices of both were left untouched. The pay of retired officers is a matter entirely within the control of Congress, and so is their rank.

Judgment affirmed.

THE "JULIA BLAKE."

1. The master of a vessel can neither sell nor hypothecate the cargo, except in case of urgent necessity; and he can only lawfully do what is directly or indirectly for its benefit, considering the situation in which it has been placed by the accidents of the voyage.
2. The necessity under which he acts is a question of fact, to be determined in each case by its circumstances; and upon his hypothecation of the cargo under his implied authority the lenders are chargeable with notice of the facts on which he appears to rely as his justification, and they must make inquiries and judge for themselves and at their own risk whether the owner, if present, would do or ought to do what, in his absence, the master is undertaking to do for him. Before there can be a recovery against the owner, it must be shown that the circumstances were such as to make it apparently proper for the master to do what he has done. To this extent the burden of proof is clearly on the lenders.
3. Where it appears that from the port where the vessel entered in distress the cargo could be forwarded by another vessel, and that it was for the interest of the shipper that it should be so forwarded, instead of being hypothecated to pay for the repairs of the vessel, and that they could not have been effected without an expense to him of very much more than it would cost to reclaim his property, pay all lawful charges on it, and forward it by another vessel, — *Held*, that the master had no authority to pledge the cargo without the consent of the shipper or the consignee.
4. Although the bottomry bond cannot be enforced against the cargo, the latter will not be held in that suit for any charges which the vessel may have thereon, where a claim for them is not made in the libel.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is fully stated in the opinion of the court.

Mr. George De Forest Lord for the appellant.

Mr. Everett P. Wheeler for the appell[redacted]

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is a suit instituted by the Bank of St. Thomas, as the holder of a bottomry bond, against the British brigantine "Julia Blake," her cargo and freight. The decree of the District Court condemned the vessel and freight, but acquitted the cargo and its claimants. No appeal was taken on behalf of the vessel and freight, but the libellant carried the case to the Circuit Court for a review of the decree as to the cargo. The

bond was for $11,600, with fourteen per cent marine premium, and the net proceeds of the vessel and freight were about $3,500. On the hearing in the Circuit Court the libel was again dismissed as to the cargo, and from a decree to that effect this appeal was taken.

The facts found by the Circuit Court, on which, in our opinion, the rights of the parties depend, may be stated as follows: —

The "Julia Blake," a British vessel, owned by Peter Blake, of Nova Scotia, left Rio de Janeiro on or about the 31st of March, 1876, for New York, having on board a cargo consisting of five hundred and eighty-two logs of rosewood. The bills of lading were three in number, and were drawn to the order of James Philip Mee, of Rio de Janeiro, the shipper, for two hundred and fifty-three, one hundred and thirty-nine, and one hundred and ninety logs, respectively. About two hundred of the logs belonged to Mee, but the claimants had made advances on them to him. All the rest belonged to the claimants. The charter-party was dated March 16, 1876, and named Mee as the charterer. The stipulated freight was £220, of which £110 was paid in advance.

Mee gave the master of the vessel on sailing a letter of instructions, directing him to proceed to New York and there consign his vessel and cargo to Winthrop Cunningham & Sons, Philadelphia, the claimants, or their agents, and if compelled, by stress of weather or other accident, to put into St. Thomas, to consign the vessel to Lamb & Co. The voyage was prosecuted with safety until the 3d or 4th of May, on one of which days the rigging of the vessel parted, and her masts fell, the mainmast breaking at the saddle, about six feet above the deck, the foremast at the head. The fallen spars and wreck remained for some time alongside and thumping before they could be cleared away. This rendered it imprudent to prosecute the voyage, and the master properly made for St. Thomas as a port of distress, where he arrived on the 27th of May. On his arrival he applied to the acting British consul, who directed a survey to be made by the harbor-master, the principal shipwright at the port, and the master of a vessel. They properly recommended a discharge of the cargo, and it

was necessary to strip the vessel of her copper to stop the leak. The cargo was discharged, and on the 8th of June a second survey ordered by the consul on the application of the master. A copy of the report of the second survey, although in evidence, is not incorporated into the findings, nor are its contents stated, further than that the vessel was making as much water as at the time of the first survey, and that her metal had been much broken and was torn away and ragged.

When the master arrived at St. Thomas he went to several mercantile houses and seemed to be seeking a proper party to whom to consign the vessel. He finally went to Lamb & Co. and engaged them to attend to the business of the vessel and the repairs. He did not show them his charter-party or letter of instructions, but told them he had lost those papers.

Upon the arrival of the vessel at St. Thomas the master wrote his owner as follows: —

"S. S. 'Beta,' *via* Halifax.

"SAINT THOMAS, 27th May, 1876.

"PETER BLAKE, Esq.. Parsboro, Nova Scotia:

"DEAR SIR, — I regret to have to report that the brigantine "Julia Blake," on her voyage from Rio de Janeiro, encountered heavy weather on the 4th inst., and for the safety of lives, vessel, and cargo, I was compelled to cut away to righten the vessel, and to put into this port, as we were in a too disabled condition to go north. A survey will be held on Monday, and I will supplement this letter by a telegram acquainting you what the surveyors recommend to be done in her present leaky and damaged state; it will likely be necessary to discharge to ascertain damage, and for new masts, &c. This mail closes at once, so I must defer giving you full particulars until next steamer.

"I remain, sir, your obedient servant,

"(Signed) ABRAM KNOWLTON."

On the 29th of May he sent the following telegram to the owner: —

"'Julia Blake,' St. Thomas, dismasted, leaky; consigned Lamb; sending survey by mail."

Afterwards Lamb & Co., on the 13th of June, and the 22d of June, wrote the owner. Copies of their letters are as follows: —

"French frigate 'Minerve,' *via* Philadelphia.

"ST. THOMAS, 13 June, 1876.

"PETER BLAKE, Esq., Parsboro, Nova Scotia:

"SIR, — We have to confirm Captain Knowlton's letter to you, dated 27th ult., acquainting you that the dismasted brig 'Julia Blake' had put in here in a leaky and disabled condition.

"By surveyors' recommendation the vessel has been discharged, and is to-day on the marine repairing slip, for shipping and caulking, &c.; masts, sails, &c., are being made, and in the course of another month the 'Julia Blake' will probably be ready for sea in a seaworthy state.

"Captain Knowlton dispatched you a telegram, thus: —

"'"Julia Blake," St. Thomas, dismasted, leaky; consigned Lamb; sending survey by mail.'

on the 29th ult., which no doubt reached you promptly and correctly. From his not receiving any reply from you, he concluded that you wished him to follow the customary routine with documents, &c. Meantime we hand, herein, certified copy of extended protest from the 'British consulate,' which may interest you. No doubt your letters will state in what manner accounts here are to be paid.

"We remain, sir, yours faithfully,

"(Signed) LAMB & Co."

"'Alpha,' *via* Halifax.

"ST. THOMAS, 22d June, 1876.

"PETER BLAKE, Esq., Parsboro, Nova Scotia:

"SIR, — We last wrote you on the 13th instant, *via* Philadelphia, with certified copy of extended protest per 'Julia Blake,' which we trust has reached you safely.

"The S. S. 'Alpha' arrived here to-day from Halifax without bringing us any letter from you, but Captain Knowlton tells us that he had a communication, and we therefore refer you to him or his advices for particulars, in connection with the repairing and refitting of the brigantine 'Julia Blake.'

"We suppose that your next will furnish instructions regarding funds for expenses here; if you don't provide the needful, same

will likely be raised by bottomry and respondentia loan, payable on arrival at New York.

"The 'Julia Blake' should be ready for sea about 15th proximo, and

"We remain, sir, your obedient servants,

"(Signed) LAMB & Co."

To these letters of Lamb & Co., Blake, the owner, replied thus: —

"PARSBORO, July 4th, 1876.

"JAMES DONALD LAMB & Co., Esqrs., St. Thomas:

"DEAR SIRS, — I received your favor yesterday, as likewise of the 13th June, by way of Philadelphia, on the twenty-ninth day of June. My dear sirs, I did not know who to write to until lately, as Mr. J. F. Whitney was writing and getting me to write to G. R. Smith, Saint Thomas. I don't know any person there; please excuse me, as I could not answer your letter before this time; as for the 'Julia Blake' and the funds for repairing, I think it will be all right. I hope it won't be too much. I think J. F. Whitney will see it all paid after she comes to N. York. Please give all the time you can, and I guarantee you will have the pay, as I pay every one. My dear sir, this is a thing I never had to do before, you, or any person acting for the 'Julia Blake' will be sure of your pay; the vessel is worth all expenses. I depend on you to do what is right and just; after an adjustment and everything, the whole of the repairs won't come out of me. I think I will be able to pay my share, as Captain Knowlton will tell you. I want you to make sure of yourself *by bottomry* until you see how this will go in N. York; you will please let me know by return of steamer from St. Thomas all the particulars, as also the amount of repairs, and by so doing you will much oblige your humble servant,

"(Signed) PETER BLAKE."

On receipt of this, Lamb & Co. wrote the following letter: —

"Copy pr. S. S. 'Alpha.'

"ST. THOMAS, 20 July, 1876.

"PETER BLAKE, Esq., Parsboro, N. S.

"DEAR SIR, — We have to acknowledge the receipt of your valued favor of 4th instant, the contents of which claim our best attention.

"The 'Julia Blake' is progressing with her repairs, and will soon be ready to take in cargo; we cannot, at present, give you any precise estimate of the expenses, as a good deal remains to be done

yet, but Captain Knowlton is putting the vessel in first-rate order, having at the same time regard to every practicable economy.

"The case being one of 'general average,' the cargo will, of course, contribute its proper proportion towards expenses, and we think the documents which Captain Knowlton will take with him, will render the adjustment speedy and satisfactory to all the interests and parties concerned.

"We are, dear sir, yours faithfully,

"(Signed) LAMB & Co."

Under date of June 1, 1876, Lamb & Co. wrote the shipper of the cargo at Rio de Janeiro as follows: —

"'Star Ball' steamer from Porto Rico.

"RIO JANEIRO. "ST. THOMAS, 1st June, 1876.

"DEAR SIR, — We have to advise that the brigantine 'Julia Blake' put in here on the 27th ult., dismasted and leaky. A survey has been held, and for effecting repairs, &c., the cargo is being discharged.

"Captain Knowlton tells us that he has cabled the 'casualty' to the United States. As the cargo is consigned 'to order,' we have been unable to acquaint the New York consignees of the misfortune.

"We remain, yours faithfully,

"(Signed) LAMB & Co."

During all the time the vessel was at St. Thomas there was facility for telegraphic communication with New York, and until the 21st of July with Rio de Janeiro, by way of New York, London, Lisbon, and Pernambuco. On this last date a break occurred in the cable between Bahia and Rio de Janeiro, but the Western Union Telegraph Company continued to transmit telegrams to Bahia, from whence they were forwarded to Rio de Janeiro, the time required for transmission from New York to Rio de Janeiro being about five days. These lines of telegraph were often employed by merchants and men of business at St. Thomas, and that from St. Thomas to New York was known to and used by the claimants. From the findings it does not appear that the telegraph was used by any of the parties after the telegram was sent the owner of the vessel on the 29th of May, and no other letters appear to have passed between the parties until after the vessel had completed her repairs and sailed with her cargo for New York.

Immediately after the second survey was completed the repairs on the vessel were commenced. The bills for the repairs and supplies were paid by Lamb & Co., after the master had certified to their correctness. The repairs were completed on the 22d of July, and thereupon the master advertised for a loan on bottomry and respondentia of ship, freight, and cargo, to the amount of $7,500, or thereabouts. The Bank of St. Thomas alone made a proposal, and for the whole amount, at a maritime interest of fourteen per cent. Lamb & Co. made no inquiries as to the necessity of the repairs and supplies, but relied wholly on the statement of the master. The only inquiry made by the bank was as to the sufficiency of the security and the regularity of the papers in their form of execution.

The discharge of the cargo was necessary in order to stop the leaks and make the vessel seaworthy. The repairs and supplies furnished, as well as the remetalling, were necessary to put the vessel in a seaworthy condition for a voyage to New York.

When the loan came to be closed, the master told Lamb & Co. that a large amount of expenses had been incurred of which they had no previous information, and that the amount required to defray the expenses and pay their commissions and charges was $11,600. This amount the bank advanced, and took the bond. The vessel left St. Thomas on the 5th of August. On her arrival in New York the payment of the bond was refused, and she, with her freight and cargo, was libelled.

The cargo was not perishable and would not have been injured by being stored under cover at St. Thomas for three or four months, and was worth in New York about $18,000. St. Thomas is a central port where vessels go seeking business, and to which parties requiring vessels also go. Vessels for the shipment of merchandise are always available there. The cargo could have been forwarded from there by vessels other than the "Julia Blake" for from $1,000 to $1,500, and it was for the interest of the owners that it should be so forwarded, rather than hypothecated to pay for repairs to the "Julia Blake."

On the 28th of September, after the vessel had sailed for

New York, Lamb & Co. wrote the shipper of the cargo as follows: —

"Per S. S. 'Nile,' *via* Southampton.

"RIO DE JANEIRO. "ST. THOMAS, 28th September, 1876.

"DEAR SIR, — Your favor of the 13th July last reached us recently *via* Porto Rico, and only after the 'Julia Blake' had sailed from this port. The letter of instructions which you mention having given to Captain Knowlton on sailing from Rio has never been laid before us, nor did he produce the charter-party, although we repeatedly asked for it; he alleged that it had been mislaid or lost at the time of the disaster at sea, and, on being questioned, denied having any instructions from you as to the consignment of vessel in case of average. The bills of lading being 'to order' left us no clue as to the consignees of cargo. The casualty was, however, at once cabled to the New York Board of Underwriters.

"While we regret that you should have felt any doubt as to our compliance with your wishes, it will now be clear to you how blameless we are in the matter.

"Whether Captain Knowlton purposely withheld information from us, or if he actually did lose the documents referred to, remains at present open for conjecture only, but the control intended to have been placed with us remained, in part at least, in hands of the captain, as master of the vessel.

"We would suggest that you advise us by mail of the despatch of all vessels conveying instructions from you to our firm, in the event of their putting into this port in distress — would thus, if necessary, be able at once to take up a position with the master, and the protection of your interests at our hands can thus not be disputed or ignored.

"The adoption of such a course on your part is, we think, more advisable under present circumstantial means of mail communication between Rio and St. Thomas.

"We are, dear sir, yours, very truly,

"LAMB & Co."

The letter from the shipper referred to is not included in the findings, and it nowhere appears that it was in evidence.

The case depends entirely on the authority of the master of the vessel to give the bottomry bond on the cargo. It is now the settled law of the English courts that a master "cannot bottomry a ship without communication with his owner, if

communication be practicable, and, *a fortiori*, cannot hypothecate the cargo without communicating with the owner of it, if communication with such owner be practicable." *The Cassa Marittima*, 2 App. Cas. 156. This doctrine was first announced in *The Bonaparte*, 8 Moore P. C. 459, decided in 1853, and has been steadily adhered to since, not, however, without decided opposition by Dr. Lushington. *The Hamburg*, 2 Moore P. C. N. S. 289; *Cargo ex Sultan*, 1 Swabey, 504. Whether the rule, to the extent it has been carried in England, is in accordance with the general maritime law, as understood in this country and the maritime nations of Europe other than Great Britain, or whether, since the "Julia Blake" was a British vessel, the authority of her master in a Danish port is to be determined by the English law, instead of the general maritime law, or the law of Denmark, are questions we deem it unnecessary to consider; for, in our opinion, even under the most liberal construction of any recognized rule which can be invoked for the authority of the master over the cargo, this bond cannot be sustained.

The master can neither sell nor hypothecate the cargo, except in case of urgent necessity, and his authority for that purpose is no more than may reasonably be implied from the circumstances in which he is placed. He acts for the owner of the cargo because there is a necessity for some one to do so, and, like every agent whose authority arises by implication of law, he can only do what the owner, if present, ought to do. Necessity develops his authority and limits his powers. What he does must be directly or indirectly for the benefit of the cargo, considering the situation in which it has been placed by the accidents of the voyage. As was said by Sir William Scott in *The Gratitudine*, 3 C. Rob. 240, 261, by which the power of the master, under proper circumstances, to hypothecate the cargo to pay the expenses of repairs on the ship was incontrovertibly established: "In all cases it is the prospect of the benefit to the proprietor that is at the foundation of the authority of the master. It is therefore true that, if the repairs of the ship produce no benefit or prospect of benefit to the cargo, the master cannot bind the cargo for such repairs; but it appears to me that the fallacy of the argument, that the

master cannot bind the cargo for the repairs of the ship, lies in supposing that whatever is done for the repairs of the ship is, in no degree and under no circumstances done for the benefit, or with the prospect of benefit, to the cargo; whereas the fact is, that, though the prospect of benefit may be more direct and more immediate to the ship, it may still be for the preservation and conveyance of the cargo, and is justly to be considered as done for the common benefit of both ship and cargo." To the same effect is what was said by Chief Baron Pollock in *Duncan* v. *Benson*, 1 Exch. 557: "But this agency for the freighter is confined to cases affecting his interest, and where the sale or pledge is directly or indirectly for his benefit. It is directly beneficial where goods are damaged by perils of the sea, and sold; it is indirectly so where there is damage to the ship, and the repairs become necessary for the benefit of the whole adventure." Sir Robert Phillimore was even more explicit in the case of *The Onward*, Law Rep. 4 Ad. & Ec. 38, 57, where he used this language: "The next consequence from the doctrine of agency is that the master must sustain, to the best of his power, the interest of the absent owner. This is a principle of general maritime law, and not . . . of English law only. Boulay-Paty observes, . . . he must do that which there is fair reason to suppose the owner, if present, would do. . . . The master is to remember the foundation of his authority to give a bottomry bond on cargo is the prospect of benefit, direct or indirect, to the proprietor of it. This principle limits the authority of the master in this matter." So, in this country, Mr. Justice Washington said, in *Ross* v. *The Ship Active*, 2 Wash. C. C. 228, 237: "But at all events the necessity must be such as to connect the act with the success of the voyage, and not for the exclusive interest of the ship-owner." Undoubtedly in all such cases much is left to the master's discretion; but, to use the language of Mr. Justice Story in *The Packet*, 3 Mason, 255, 259, "he must exercise it conscientiously for the general interest." This court said, in *New England Ins. Co.* v. *The Sarah Ann*, 13 Pet. 387, 400, speaking of the analogous authority of the master to sell the ship: "All will agree that the master must act in good faith, exercise his best discretion for the benefit of all concerned, and that it can only

be done upon the compulsion of necessity, to be determined in each case by the actual and impending peril to which the vessel is exposed." And in *The Amelie*, 6 Wall. 18, 27, it was said: "And this necessity is a question of fact, to be determined in each case by the circumstances in which the master is placed and the perils to which the property is exposed. If the master can within a reasonable time consult the owners, he is required to do it, because they should have an opportunity to decide whether, in their judgment, a sale is necessary." When the master is dealing with the cargo for the benefit of the voyage, he "must endeavor to hold the balance evenly between his two principals; he must not sacrifice the ship to the cargo or the cargo to the ship." *The Onward, supra.*

It is equally well settled that a lender, upon the hypothecation of the cargo by a master of the vessel under his implied authority, is chargeable with notice of the facts on which the master appears to rely as a justification for what he is doing. Such a lender is presumed to know that the power of the master is to be determined by the necessities of the case in their legal operation on the owner of the cargo. As necessity creates the agency, and that only can be authorized which, under the circumstances, is reasonable and just, he must make his own inquiries and judge for himself, and at his own risk, whether, if the owner were present, he would do or ought to do that, or something equivalent, which the master is undertaking to do for him in his absence. A lender cannot shut his eyes to existing facts as they appear, or by reasonable inquiry could be made to appear, and treat with the master as a general agent, having authority to do not only what the owner ought to do, but what he might do if he chose. Before there can be a recovery against the owner it must be shown that the circumstances were such as to make it apparently proper for the master to do what he has done. To this extent the burden of proof is clearly on the lender. *The Aurora*, 1 Wheat. 96; *Thomas* v. *Osborn*, 19 How. 22; *The Amelie*, 6 Wall. 18; *The Grapeshot*, 9 id. 129; *The Lulu*, 10 id. 192. In these cases the rule was applied to the hypothecation of the ship by the master, where less strictness will ordinarily be required than in the hypothecation of the cargo, because the master is the

appointed agent of the owner of the ship, but the involuntary agent of the owner of the cargo.

It remains only to apply these well-settled rules to the facts of the present case.

When the loan was advertised for and put on the market the cargo was out of the vessel and in store. It was not perishable, and could be sent forward to its place of destination in another vessel, without any considerable delay, at a cost of from $1,000 to $1,500. The vessel had been two months in port. Her cargo was consigned to New York. The bills of lading were drawn to the order of the shipper, but accompanying them was a letter to the master instructing him to whom to report at the end of his voyage. If this letter had been lost, as the master claimed it was, the fact that it had been given was not forgotten by him, for when he first went to Lamb & Co. he told them of its loss. From that time for nearly two months, and until the day before the loan was advertised for, telegraphic communication between St. Thomas and Rio de Janeiro was practicable and reasonably direct. The necessity for unloading the cargo and making extensive and costly repairs on the vessel to fit her for the further prosecution of the voyage was known as soon as the surveys were completed, and yet neither the master nor Lamb & Co. made any attempt to ascertain from the shipper by telegraph his wishes about the disposition to be made of the cargo under the circumstances, or even to get information as to the names of the consignees in New York, with whom there could be communication both by mail and telegraph. Lamb & Co. did, indeed, on the 1st of June, write the shipper by mail that the vessel had put into St. Thomas dismasted and leaky; that a survey had been held, and that, for effecting repairs, the cargo was being discharged. But even this meagre information did not probably reach its destination until about the 13th of July, — only a few days before the loan was advertised for.

Although Lamb & Co. were engaged by the master to attend to the business of the vessel and her repairs, they made no inquiry as to the propriety of what was done, but relied entirely on his statements, and apparently allowed him to do what he pleased; for it was not until a loan of $7,500 had been applied

for and taken, that they knew it would require $11,600 "to defray expenses and their charges and commissions," and then only when it was told them by him.

The findings show that when the vessel had been out from Rio de Janeiro a little more than thirty days "her rigging parted and her masts fell, the mainmast breaking at the saddle and her foremast at the head." On her arrival at St. Thomas her cargo had to be discharged to stop the leaks; her metal was "much broken and torn away and ragged," and had to be replaced with new to make her seaworthy for a voyage to New York; and although on her reaching there she was attached and sold for but $4,500, leaving, after paying wages of the crew and expenses of the sale, only $3,500 to apply on the loan, the aggregate of her expenditures in St. Thomas was $11,600.

From these facts it is, to our minds, apparent that when the vessel arrived at St. Thomas she ought not to have been repaired at the risk of expense to the owner of the cargo without his consent, and that this could easily have been ascertained by an inquiry into the facts. She came in "dismasted and leaky" "for a general equipment and refit," with a cargo substantially imperishable, which might be forwarded in another vessel at comparatively small expense; and it must have been easy to see that to repair the vessel at the risk of the owner of the cargo would be to place his interests in jeopardy, without any urgent necessity on his account. No master who "held the balance evenly between his two principals" could have believed himself justified, under the circumstances, in hypothecating the cargo for any such purpose, without notice to the owner. But when the repairs were completed, and the hypothecation was tendered, the impropriety of what the master proposed to do was even more apparent. Then the offer was to pledge vessel, freight, and cargo for $13,324, when the most casual observer must have seen that the vessel and freight would actually secure only a comparatively small part of the amount required. Of all this the lender, who made no inquiries whatever, is chargeable in law with notice. Had he inquired, and been deceived through no fault of his own, the case might have been different; but having failed to inquire at all, he is pre-

sumed to know all that the master knew. His case presents itself, therefore, as that of a lender upon the hypothecation of a cargo by the master, without communication with the consignee or owner, to pay the expenses of permanent repairs to the vessel, when it was manifest that the owner of the cargo could not be benefited by what was done to anything like the amount with which he was to be charged.

It is contended, however, that the owner of the cargo has no right to demand his property at an intermediate port unless the voyage has been actually abandoned or the necessary repairs on the vessel cannot be effected. The cargo owner is not bound to help the vessel through with her voyage under all circumstances. It is the duty of the vessel owner, and of the master as his appointed agent, to do all that in good faith ought to be done to carry the cargo to its place of destination, and for that purpose the cargo owner should contribute to the expense as far as his interests may apparently require; but he is under no obligation to sacrifice his cargo, or to allow it to be sacrificed, for the benefit of the vessel alone. He ought to do what good faith towards the vessel demands, but need not do more. If he would lose no more by helping the vessel in her distress than he would by taking his property and disposing of it in some other way, he should, if the vessel owner or the master requires it, furnish the help or allow the cargo to be used for that purpose. To that extent he is bound to the vessel in her distress, but no further. When, therefore, a cargo owner finds a vessel, with his cargo on board, at a port of refuge needing repairs which cannot be effected without a cost to him of more than he would lose by taking his property at that place and paying the vessel all her lawful charges against him, we do not doubt that he may pay the charges and reclaim the property. Otherwise he would be compelled to submit to a sacrifice of his own interests for the benefit of others, and that the law does not require. What charges must be paid will depend on the circumstances of the case. Sometimes they may include full freight, expenses at the port of refuge, general average charges, and possibly more, and sometimes less; but upon full payment of such as are in law demandable, the cargo must be surrendered.

In the present case, it is not only found as a fact that it was for the interest of the shipper that his property should be forwarded by some other vessel rather than that it should be hypothecated to pay for the repairs, but everything else in the findings points unmistakably to the conclusion that such repairs could not have been effected without an expense to him of very much more than it would cost to reclaim his property, pay all lawful charges upon it, and send it forward by some other conveyance. Under such circumstances, we have no hesitation in saying that the master had no authority to pledge the cargo as he did without the consent of the shipper or consignees. The notice given the shipper was entirely insufficient and furnished no such information as would require him to act otherwise than he appears to have done. He did not get the letter until nearly six weeks after it was written, and from its contents he was justified in supposing that before his property was incumbered to any considerable amount he would be notified by telegraph. Certainly, so long as the mail only was used to communicate with him, he need not have supposed it was necessary at the end of six weeks to employ the telegraph for a response to such information as he got. It must have been apparent from the outset, at St. Thomas, that it would be necessary to hypothecate the cargo to pay for the repairs, if they were made, and there was no excuse for not communicating that fact either to the shipper or the consignees before it was too late for them to object or provide against it. All this the lender of the money could have known if inquiry had been made; and there was abundance of evidence in all directions to show that no prudent cargo owner would voluntarily do what the master was doing for him. Clearly, therefore, the hypothecation of the cargo was unauthorized and void.

It is insisted, however, that if the bottomry bond cannot be enforced, the cargo may be held in this suit for such charges as it was liable for to the vessel. No such claim is made in the libel. Full freight has been paid, and there is nothing in the case as it comes to us to show that anything more was demandable. If the vessel was unseaworthy when she left Rio de Janeiro, all the extraordinary expenses she incurred on the voyage were probably through her own fault, and not charge-

able on the cargo. At any rate, there is nothing in the record as it now stands to make it proper for us to remand the cause for further proceedings under this new claim.

Decree affirmed.

ALLEN v. MCVEIGH.

1. Where, in an action brought in a court of Virginia against an indorser of promissory notes, payable August, 1861, at Alexandria in that State, the point in controversy being as to the sufficiency of the notices of dishonor, and the court decided in substance that by the general principles of commercial law, if, during the late civil war, he abandoned his residence in loyal territory and went to reside permanently within the Confederate lines before the note matured, a notice left at his former residence was not sufficient to charge him, if his change of residence was known, or by the exercise of reasonable diligence might have been known, to the holder of the note when it matured, — *Held*, that no Federal question was raised by the decision.
2. Where the plaintiff's prayer for instructions relates also to the Virginia ordinance of secession and the proclamations of the President of April, 1861, and Aug. 16, 1861, but, as the case stood upon the evidence, neither of them was involved, and no title, right, privilege, or immunity thereunder was claimed by either party, — *Held*, that the prayer was properly refused; and, the only Federal question thereby sought to be raised having been correctly disposed of, this court cannot consider the other errors assigned.

ERROR to the Supreme Court of Appeals of the State of Virginia.

The case is fully stated in the opinion of the court.

Mr. Hierome O. Claughton for the plaintiff in error.

Mr. Philip Phillips, *Mr. W. Hallett Phillips*, and *Mr. William A. Maury* for the defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is a suit against William N. McVeigh, as indorser of two promissory notes, and the matter in dispute is as to the sufficiency of the notices of dishonor. The notes fell due, one on the 2d and the other on the 23d of August, 1861, at the Exchange Bank of Virginia in Alexandria. The notary, in his certificate of protest, stated that he had delivered "a notice of

protest to William N. McVeigh by leaving it at his dwelling in the hands of his white servant," and the issue on the trial was as to whether the house at which the notice was left was in fact the dwelling of McVeigh at the time. Upon this point McVeigh testified, in substance, that at some time previous to the 24th of May, 1861, he sent his family to his farm in Culpeper County, Virginia; that he remained at his home in Alexandria until after the military forces of the United States took possession of the city, which was the 24th of May; that on the 30th of May, under a pass from the United States authorities, he left his home, and went within the Confederate lines to join his family, with the intention of not returning so long as the city remained in the possession of the United States, which he supposed would be but a short time; that he left in his house a white woman about seventy years of age, who had been for many years his servant, and three colored servants, who were slaves; that he did not discharge his white servant, but advised her to go to the country; that on leaving he had great doubts whether he would ever see his property in Alexandria again; that he remained with his family in Culpeper until the fall of 1861, when he removed to Richmond and engaged in business there; and that he remained in Richmond until 1874, when he returned with his family to Alexandria.

At the close of the testimony the court, at the request of McVeigh, charged the jury that "if on or about the 30th of May, 1861, and prior to the maturity of the notes sued on, William N. McVeigh, having previously sent his family, went himself within the Confederate military lines with the intention of not returning to Alexandria during its occupation by the United States forces, and accordingly remained with his family continuously within the Confederate military lines throughout the whole period of the war, and did not return to Alexandria with his family until the year 1874; that such absence at the maturity of said notes, respectively, was known, or, by the exercise of reasonable diligence, must have been known, to the Exchange Bank of Virginia, at Alexandria; that at the time of said maturity the armed forces of the United States and of the Confederate States confronted each other on lines immediately intervening between the city of

Alexandria and the said William N. McVeigh, so as to cut off and prevent actual intercourse between the two, and such intervention continued down to the end of the war, the notice of dishonor shown by the notarial certificates of protest is not sufficient to fix the liability of William N. McVeigh as indorser, and the jury must find for him."

This instruction is substantially the same as that considered in *Bank* v. *McVeigh*, 98 U. S. 332, and which we held did not present a Federal question. The only difference, even in language, between the instructions in the two cases consists in what is said in this about the establishment and maintenance of the opposing lines of military forces and the prevention of actual intercourse, which was not in the other. No importance was given in the argument, however, to this difference, and it may as well be said now, as it was before, that "All the court below decided was, that by the general principles of commercial law, if, during the late civil war, an indorser of a promissory note abandoned his residence in loyal territory, and went to reside permanently within the Confederate lines before the note matured, a notice of protest left at his former residence in the loyal territory was not sufficient to charge him, if his change of residence was known, or by the exercise of reasonable diligence might have been known, to the holder of the note when it matured." Under the question raised by the charge as given, therefore, we have no jurisdiction.

But the plaintiff asked of the court certain instructions, which were not given, and error is assigned for this. The fourth of these requests presents all the questions relied on, and was as follows: —

"If the jury believe from the evidence that the notes sued on were discounted by the Exchange Bank of Virginia at Alexandria before their maturity, or that they were renewals of notes theretofore discounted; that at the time of discount the makers, indorser, and indorsee were residents of said city; that before the maturity of the said notes the Federal forces had taken permanent possession of said city; that after such possession the indorser, William N. McVeigh, left his residence in said city, with the intention of returning thereto, and went within the Confederate lines to join his family, at the time visit-

ing in the county of Culpeper; that the said indorser, at the time the said notes respectively became due, was within the Confederate lines in adherence to the Southern Confederacy in obedience to the Virginia ordinance of secession, — the court instructs the jury that the said ordinance of secession was of no binding force or obligation; that neither the proclamations of the President of the United States, issued in April, 1861, and Aug. 16, 1861, nor the existence of the war, nor the ordinance of secession of the State of Virginia, obliged the said indorser to be absent from his residence in Alexandria, nor relieved the holder of said notes from giving him notice of the dishonor and protest thereof; that such absence was voluntary, and did not affect the rights and duties of the parties to said notes. And if the jury believe from the evidence that at the time the said notes respectively fell due the said indorser had not abandoned his intention to return to Alexandria, and had not acquired a domicile elsewhere, and that the notes sued on were duly dishonored and protested, and on the day thereof notice of such dishonor and protest was left at the residence of the indorser in Alexandria with his white servant in charge of the same, such notice was sufficient to bind the indorser, and the jury must find for the plaintiff, if they further believe from the evidence that he is the *bona fide* holder of said notes."

The only point presented by this request, not disposed of by the charge as actually given, is that which relates to the ordinance of secession and the proclamations of the President. The plaintiff claimed no "title, right, privilege, or immunity," either under the ordinance or the proclamations; neither did the defendant. The issue in the case was as to the fact of a change of residence by the defendant, not as to his power to make a change. The plaintiff did not claim that by reason of the ordinance, or the proclamation, or even the existence of actual war, the defendant was prevented from abandoning his home in Alexandria and taking up another inside the Confederate lines. Neither did the defendant claim that the ordinance, the proclamation, or the war, of themselves, made the notice left at his former home insufficient. The ultimate fact to be determined was whether, when the notice was left at the house formerly occupied by the defendant, it was left at his place of residence.

As the case stood upon the evidence, the ordinance of secession and the proclamations were in no way involved. The plaintiff claimed nothing under them; neither did the defendant. The charge in respect to them, as requested, was therefore immaterial, and was properly refused. As this presented the only Federal question in the case, and it was correctly disposed of, we cannot consider the other errors assigned. *Murdock* v. *City of Memphis*, 20 Wall. 590.

Judgment affirmed.

MERRIAM *v.* UNITED STATES.

1. In construing contracts, a court may look not only to their terms, but to their subject-matter and the surrounding circumstances, and avail itself of the same light which at the time of making them the parties possessed.
2. Under the contract sued on in this case, *infra*, p. 489, the United States was not bound to receive a greater quantity of oats than that which is therein specifically mentioned.

APPEAL from the Court of Claims.

Merriam brought suit in the Court of Claims against the United States to recover damages for their breach of a contract by which he agreed to sell and deliver, and they to receive and pay for, a quantity of oats. His petition was dismissed, and he appealed.

That court found the following facts: The Chief Quartermaster of the Military Department of Dakota published an advertisement, the parts of which and of the circular therein referred to, so far as they are material to this case, are as follows: —

"CHIEF QUARTERMASTER'S OFFICE,
"ST. PAUL, MINN., March 1st, 1877.

"Sealed proposals in triplicate, subject to the usual conditions, will be received at this office . . . until 12 o'clock noon, on the twenty-sixth day of April, at which time they will be opened in the presence of bidders, . . . for furnishing and delivering of wood, coal, grain, hay, and straw, required during the fiscal year commencing July 1, 1877, and ending June 30, 1878, at the following

posts and stations, viz.: (Here follows a list of the posts and stations for which the supplies were required.)

"Separate bids should be made for each post and for each class of supplies. . . . The government reserves the right to reject any and all bids. In bidding for grain, bidders will state the rate per 100 pounds and not per bushel.

"Blank proposals and printed circulars stating the kind and estimated quantities required at each post, and giving full instructions as to the manner of bidding, conditions to be observed by bidders, and terms of contract and payment, will be furnished on application," &c.

The circular referred to contains these clauses: —

"The following are the estimated quantities of supplies that will be required at each post, but the government reserves the right to increase or diminish the same at any time during the continuance of the contract, and to require deliveries to be made at such times and in such quantities as the public service may demand: Fort Abraham Lincoln, D. T., 2,404,000 pounds oats; Fort Buford, D. T., 256,000 pounds oats; Cheyenne Agency, D. T., 131,000 pounds oats; Camp Hancock, D. T., 5,400 pounds oats; Lower Brule Agency, D. T., 34,300 pounds oats; Fort Randall, D. T., 233,000 pounds oats; Fort Rice, D. T., 1,000,000 pounds oats; Standing Rock Agency, D. T., 255,000 pounds oats; Fort Stevenson, D. T., 96,000 pounds oats; Fort Sully, D. T., 50,000 pounds oats.

"Proposals are invited for the furnishing and delivering" of "grain for Forts Abraham Lincoln, Buford, Randall, Rice, &c., &c., either at Sioux City, Yankton, Bismarck, or Fort Abraham Lincoln."

In accordance with the advertisement one Hall proposed to furnish 4,000,000 pounds of oats, to be delivered at Bismarck, for $2.25 per hundred pounds; and the appellant proposed to furnish, at the same place, 1,600,000 pounds of oats at $2.23\frac{7}{16}$ per hundred pounds, a like quantity at $2.28\frac{1}{2}$, another like quantity at $2.31, and another like quantity at $2.37, — making 6,400,000 pounds the entire quantity which he bid to furnish and deliver.

On May 18, 1877, an award was made to the appellant for furnishing and delivering at Bismarck 1,000,000 pounds of oats at $2.23\frac{7}{16}$ per hundred pounds. On June 27 an award was made

to Hall for furnishing and delivering at Bismarck 2,620,000 pounds of oats at $2.25 per hundred pounds; and on the same day a further award was made to the appellant for furnishing and delivering, at the same place, 600,000 pounds of oats at $2.23\frac{7}{16}$ per hundred pounds.

On June 29, 1877, the contract on which this action was brought was executed by the quartermaster in behalf of the United States and by the appellant. It was made on a printed blank furnished by that officer. The first article of the agreement is as follows: —

"ARTICLE I. That the said John L. Merriam, his heirs, assigns, administrators, and executors, shall supply, or cause to be supplied and delivered to the quartermaster's department at the military station of Bismarck, D. T., six hundred thousand pounds, more or less, of oats, at two dollars and twenty-three and seven-sixteenths cents ($2.23\frac{7}{16}$) per one hundred pounds, the oats to be of good merchantable quality, free from dirt or other foreign matter, and to be delivered in good, new burlap sacks, each sack to contain no greater quantity than 128 pounds, or such other quantity, more or less, as may be required from time to time for the wants of said station, between the first day of July, 1877, and the thirty-first day of December, 1877, in such quantities and at such times as the receiving officer may require: *Provided*, that this contract is approved by the commanding generals of the Department of Dakota, and of the Military Division of the Missouri; otherwise not until such approval is obtained."

In accordance with the award to him, dated May 18, 1877, the appellant had previously entered into another contract with the quartermaster acting on behalf of the United States, bearing date May 15, 1877, for the delivery of 1,000,000 pounds of oats, which was identical in terms with the above-mentioned contract, except that the words "Or such other quantity, more or less, as may be required from time to time for the wants of said station, between the first day of July, 1877, and the thirty-first day of December, 1877, in such quantities and at such times as the receiving officer may require," found in Article I., were omitted.

Two other contracts, dated June 29, 1877, were made between said quartermaster and said Hall, in accordance with his

said bid, one for the delivery of 665,000 pounds of oats, and the other for the delivery of 1,955,000 pounds, each at $2.25 per one hundred pounds. In other respects the two contracts were identical in form with those of the appellant, the one first above mentioned having the same words omitted which were omitted from the appellant's contract of May 15, 1877, and the other containing them.

There were delivered at Bismarck, as under the two contracts of Hall, by parties other than the appellant, 3,116,616 pounds of oats, between July 1, 1877, and Dec. 31, 1877.

The appellant, after the execution of his said contracts respectively, commenced delivering oats thereunder, and by July 12, 1877, had delivered more than 1,600,000 pounds specifically mentioned in the two contracts, the excess having been received by the acting assistant quartermaster at Bismarck, by mistake, and he was paid in full for all that he had delivered.

Subsequently he offered to deliver nine car-loads of oats, but they were refused.

Neither the receiving officer nor any other officer of the United States required the appellant to supply for the wants of said station any other quantity of oats than that specifically mentioned in the contract sued on; and the appellant did not ask to be informed whether any other quantity would be required, and although he repeatedly offered the several car-loads of oats above mentioned to the acting assistant quartermaster, and requested him to take them in order to clear up all he had at Bismarck, and get the railroad company's cars unloaded, he never demanded it as a right under his contract.

Within the time mentioned in his contract the appellant had the means to deliver oats to the full extent of the quantity delivered under Hall's contract by other parties, in addition to that which was received from him, had he been required and permitted so to do, and he was ready and willing to make such delivery, although he gave the defendant's officers no notice to that effect, and made no other offers than that above set forth.

The appellant suffered some loss by reason of the non-receipt by the defendants of the several car-loads of oats above mentioned, and by being obliged to sell the same to other parties; and some loss of profits which he would have made if he had

delivered at the contract price oats to the extent of the quantity received by the defendants under said Hall's contracts, in addition to the quantity which he did deliver, and for which he was paid.

Mr. John B. Sanborn for the appellant.
The Solicitor-General for the United States.

MR. JUSTICE WOODS delivered the opinion of the court, and, after making the foregoing statement, proceeded as follows: —

The contention of the appellant is, that under that clause of the contract sued on which provides as follows: "Said Merriam shall supply 600,000 pounds, more or less, of oats, . . . or such other quantity, more or less, as may be required from time to time for the wants of such station between the first day of July, 1877, and the thirty-first day of December, 1877, in such quantities and at such times as the receiving officer may require," he was bound to deliver, and the United States to receive, in addition to the 1,600,000 for which his bid was accepted, all the oats needed for the wants of the station between the dates mentioned. And as it appears from the finding of the Court of Claims that a large quantity of oats, over and above that received from the appellant, was received at Bismarck between the dates mentioned, under the contract made with Hall, and that the appellant's offer to furnish a quantity of oats in addition to the amount specifically mentioned in his contract was declined, that a breach of his contract is shown, for which he is entitled to damages. It is contended on behalf of the United States that under the contract sued on the appellant was bound to deliver, and the United States to receive, 1,600,000 pounds of oats, and no more, unless required to do so by the quartermaster. The only question presented by the record is, which of these two constructions of the contract is the true one.

It is a fundamental rule that in the construction of contracts the courts may look not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made. *Nash* v. *Towne*, 5 Wall. 689; *Barreda* v. *Silsbee*, 21 How. 146, 161; *Shore* v. *Wilson*,

9 Cl. & Fin. 355, 555; *McDonald* v. *Longbottom*, 1 El. & El. 977; *Munford* v. *Gething*, 29 L. J. C. P. 110; *Carr* v. *Montefiore*, 5 B. & S. 407; *Brawley* v. *United States*, 96 U. S. 168.

Thus, in the case of *Doe* v. *Burt*, 1 T. R. 701, where a lease had been made by the plaintiff to the defendant of part of a messuage, together with a piece of ground thereunto adjoining, which piece of ground was used as a yard, and beneath the yard was a cellar, occupied by a third party under a lease previously granted to him by the plaintiff, and the occupant of the cellar continued to reside in it and to pay rent to the plaintiff for three or four years after the latter had demised the yard to the defendant, but his lease having expired, and he having quitted the cellar, the defendant took possession of it, contending that it had passed to him by the demise of the yard, the court held that parol evidence of the surrounding circumstances was admissible to show that it did not pass.

Availing ourselves of the light thrown on the contract in this case by the circumstances under which it was made, we are of opinion that the construction claimed for it by the appellant cannot be sustained.

The specific quantity of oats to be delivered at Bismarck, for which the circular for the information of bidders invited proposals, was 4,464,700 pounds. The appellant made bids for 6,400,000 pounds; 1,600,000 pounds of which were at the price of $\$2.23\frac{7}{16}$ per hundred pounds, 1,600,000 at $\$2.28\frac{1}{8}$ per hundred pounds, and the residue at still higher prices. His bid for 1,600,000 pounds at $\$2.23\frac{7}{16}$ per hundred pounds was the only bid made by him which was accepted. The bid of Hall was at the same time accepted for 2,620,000 pounds at $2.25 per hundred pounds, and contracts were made with him for the delivery of that amount. It thus appears that the lowest bids were accepted, and contracts made in accordance therewith. The contracts made with both the appellant and Hall were identical in form. The bids accepted fell a little short of the entire quantity for which bids were asked. The appellant now insists that by reason of the clause in his second contract, by which, in addition to the specific quantity of oats therein mentioned, he agreed to supply such other quantity, more or less, as might be required for the wants of said station, and

which also was found in the second contract made with Hall, the United States were bound to receive from him oats for which his bid was not accepted, and for the delivery of which the bid of Hall, lower than his own, was accepted. It is perfectly clear, from these circumstances, that the officers of the United States who had this matter in charge did not understand the contract with appellant as he now claims to construe it. In other words, they did not intend to contract with two different persons for twice the quantity of oats needed for the wants of the station. Nor did they intend, after making awards to two different bidders for specific quantities of oats to disregard the awards and enter into contracts by which the higher bidder should supply all the oats.

We think the facts found by the Court of Claims show also that the construction now claimed by the appellant could not have been his understanding of the contract when it was made. The advertisement calling for bids announced that they would be opened in the presence of bidders. The appellant bid to furnish 6,400,000 pounds of oats. His bid was accepted for only 1,600,000 pounds out of the 4,464,700 pounds for which bids were specifically invited. On the same day on which the contract sued on was executed the same quartermaster executed two contracts with Hall for the oats, the furnishing of which had been awarded to him.

It is not specifically found by the Court of Claims that the appellant knew that the bids of Hall for nearly all the oats needed at the station, not awarded to the appellant, had been accepted, nor that he knew that contracts had been made with Hall for the delivery of the oats in accordance with the awards made to him. But he knew that his own bid was accepted for less than half of the quantity for which bids were invited. He must have known, therefore, that he had a successful competitor in the biddings, who entered into the required contract for the delivery of the oats for which the bid of the latter had been accepted by the officer acting on behalf of the United States; for the printed circular informed him that the bidder whose proposal was accepted would be required to enter into a contract to perform his bid, and he himself had been required to execute a contract to deliver the oats which it was awarded to him to furnish.

These facts being known to the appellant, he could not have understood the contract sued on, which was made on the same day as the contract with Hall, as he now contends it should be interpreted. If, therefore, the circumstances surrounding the making of the contract were such that neither party to it could have construed it as the appellant now claims it should have been construed, we must reject that construction and seek one fairly justified by the language of the contract, more consistent with the circumstances of the case. Under the light of these circumstances it is clear that the contract bound the appellant to deliver, in addition to the specific quantity named, such other quantity, more or less, of oats, as might be needed from time to time for the wants of the station, and as he might be required to deliver.

That such was the appellant's understanding of the contract is evident from the further fact found by the Court of Claims, that the appellant never asked to be informed whether or not any other oats above the quantity specifically mentioned in his contract would be required; and when he offered the nine carloads of oats to the receiving officer he requested him to take them in order to clear up all he had at Bismarck and get the railroad company's cars unloaded, but never claimed that he had the right to deliver the oats under his contract. It is, therefore, plain that the interpretation he now puts on his contract is an afterthought, and is not the interpretation put upon it by the parties when it was executed.

The construction we have put upon the contract does no violence to its language. The provision that the oats required for the wants of the station, over and above the quantity specifically mentioned in the contract, were to be delivered in such quantities and at such times as the receiving officer might require, may well be construed to leave with him a discretion to call for the additional oats or not, as in his judgment they were or were not necessary for the wants of the station; and if he required none, the appellant was bound to deliver and the United States to receive none.

We are of opinion that the Court of Claims was right in dismissing the petition of the appellant.

Judgment affirmed.

COOK COUNTY NATIONAL BANK v. UNITED STATES.

Section 3466 of the Revised Statutes, *infra*, p. 447, which, in certain cases therein mentioned, gives to the United States priority of payment of debts due to it, does not apply to its demands against an insolvent national bank.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

This is an appeal from a decree of the Circuit Court overruling a general demurrer to a bill filed by the United States against the Cook County National Bank of Chicago, Ill., and Augustus H. Burley, its receiver. The facts, as stated in the bill, are briefly as follows: Previously to 1872, the bank was formed under the acts of Congress authorizing the organization of national banks, and was designated as a depositary of moneys of the United States. In January, 1875, it became insolvent, and suspended business. In February following, Burley was appointed by the Comptroller of the Currency its receiver, and he immediately entered upon the discharge of his duties.

At the time of its suspension, the bank had on deposit "of postal funds" $24,900, and of "money-order funds" $14,684, which are respectively designated on its books by those names. These moneys had been deposited with the bank by John McArthur, a deputy postmaster at Chicago.

The Treasury Department at the time held United States bonds, placed with it by the bank, to the amount of $150,000 par value, as security for all public moneys which might be deposited with the bank. These bonds were afterwards sold for $174,544.52. Of the proceeds, $155,305.47 were appropriated to pay the amount then on deposit with the bank to the credit of the Treasurer of the United States. Of the balance remaining, $11,803.98 were applied on the "postal funds," and $7,435.07 on the "money-order" funds, leaving still due on account of those two funds $20,344.95.

In addition to these bonds, there were at the time, in the Treasury Department, United States bonds to the amount of $100,000 par value, deposited by the bank to secure its notes issued for circulation. When, in 1875, the bank failed to pay these notes, the Comptroller of the Currency declared the bonds

forfeited to the United States. A part of them have been sold, and it is the intention of the Treasury Department to sell the remainder, and apply the proceeds to pay the notes in circulation, and reimburse the United States for sums already advanced for that purpose. The proceeds of all the bonds, when sold, will be sufficient to redeem the notes, reimburse the United States in full for their advances, and leave a balance exceeding $30,000, — more than sufficient to pay the debts due by the bank to the United States for "postal funds" and "money-order funds."

The Treasury Department, in addition to the bonds to secure the circulation of the notes, has a sum exceeding $30,000 belonging to the bank, collected from bills receivable and debts due to it; but its liabilities notwithstanding greatly exceed its assets.

Upon these facts the question arose whether the claim of the United States for moneys deposited by the deputy postmaster at Chicago is a preferred debt or not; and the officers of the United States are in doubt as to their duty on the subject, — that is, whether they should reserve from the funds in the Treasury Department belonging to the bank a sufficient amount to pay the debt for "postal funds" and "money-order funds" due to the United States, or whether they should distribute the said moneys *pro rata* to all the creditors of the bank, including the United States.

The bill prays that an account be taken of the amount due to the United States by the bank for moneys so deposited with it by the deputy postmaster, and that a decree be entered directing the disposition of the funds belonging to the bank in the control of the Treasury Department.

The defendants treated the bill as filed to obtain a decree adjudging to the United States a priority in the payment of their demand against the bank for the balance due on the postal and money-order funds, and interposed a general demurrer to it. The court, taking a similar view of the bill, overruled the demurrer. The defendants thereupon elected to stand by their demurrer, and as they at the same time admitted that the bank had a sufficient amount to pay the whole of the principal and interest due to the United States for the funds deposited

by the deputy postmaster as postal funds, and as money-order funds, the court ordered that the amount thus due should be paid in full out of the assets of the bank. From this decree the appeal was taken.

The case was argued by *Mr. Roscoe Conkling*, with whom was *Mr. Henry S. Monroe*, for the appellants, and by *Mr. William C. Goudy* for the appellee.

MR. JUSTICE FIELD, after stating the facts, delivered the opinion of the court.

The Revised Statutes, in sect. 3466, provide that "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

This section is substantially a copy of sect. 5 of the act of March 3, 1797, c. 20, entitled "An Act to provide more effectually for the settlement of accounts between the United States and receivers of public money." Statutes passed before 1797 embody similar provisions, and also declare that parties who are sureties of insolvents may pay to the United States any balance due to them, and have the same priority in the payment of their demands out of the estates of such insolvents as the United States would have if no such payment were made.

The language of the section in the Revised Statutes is general and comprehensive in its terms, and applies to demands of the United States against any insolvent person living, or the estate of any insolvent person dead; and also to demands against any person who, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, and against any estate of an absconding, concealed, or absent debtor whose effects have been attached by process of law.

The question is whether, under this broad and general lan-

guage, the United States, having demands against an insolvent national bank, are entitled to priority of payment out of its assets over other creditors. The appellants contend that the statute refers to such insolvency as is determined by judicial decree, as under a bankrupt act, or is manifested by the debtor's voluntary assignment of his property, or by its attachment under process against him, as an absconding, concealed, or absent debtor, and that within this meaning the Cook County National Bank never became insolvent, and that, therefore, the provisions giving priority of payment to demands of the United States against insolvents do not apply.

From the view we take of the act authorizing the formation of national banks, it is unnecessary to consider whether or not this position is tenable. We consider that act as constituting by itself a complete system for the establishment and government of national banks, prescribing the manner in which they may be formed, the amount of circulating notes they may issue, the security to be furnished for the redemption of those in circulation; their obligations as depositaries of public moneys, and as such to furnish security for the deposits, and designating the consequences of their failure to redeem their notes, their liability to be placed in the hands of a receiver, and the manner, in such event, in which their affairs shall be wound up, their circulating notes redeemed, and other debts paid or their property applied towards such payment. Everything essential to the formation of the banks, the issue, security, and redemption of their notes, the winding up of the institutions, and the distribution of their effects, are fully provided for, as in a separate code by itself, neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates.

In the first place, the banks are required to deposit with the Treasurer bonds of the United States as security for any notes that may be issued, the amount of which cannot in any case exceed ninety per cent of the par value of the bonds. Rev. Stat., sect. 5171. Should the market or the cash value of the bonds become reduced at any time below the amount of the notes issued, the Comptroller of the Currency may require that the amount of the depreciation be deposited with the

Treasurer in other United States bonds, or in money, so long as such depreciation continues. Rev. Stat., sect. 5167. In case of the refusal of a bank to pay its notes, the bonds may be sold at public auction in the city of New York, and their proceeds applied to reimburse the United States the amount expended by them in paying the circulating notes; and for any deficiency which may remain the United States are entitled to a paramount lien upon all the assets of the bank, which is to be paid in preference to all other claims, except for costs and necessary expenses in administering the same. Rev. Stat. sect. 5230.

In the second place, when the banks are made depositaries of public moneys and employed as financial agents of the government, it is the duty of the Secretary of the Treasury to require them to give satisfactory security by the deposit of United States bonds, or otherwise, for the safe-keeping and prompt payment of the public money deposited, and for the faithful performance of their duties as financial agents. The amount of security which the Secretary may thus require has no limit but his own judgment as to its necessity. Every officer of a bank which is not an authorized depositary, and which has not therefore given the required security, who knowingly receives any public money on deposit, is liable for embezzlement. Rev. Stat., sect. 5497. The government can thus always have security, limited in amount only by the judgment of the Secretary of the Treasury, for public moneys deposited with any national bank.

With these provisions for security against possible loss for moneys deposited, it would seem only equitable that the government should call for such security, and, if it prove insufficient, take the position of other creditors in the distribution of the assets of the bank in case of its failure. The framers of the banking law evidently so regarded the matter. After providing for the appointment of a receiver by the Comptroller of the Currency upon the suspension or failure of a bank, the law requires the receiver to take possession of its books and records, and assets of every description, and to collect all debts, dues, and claims belonging to it; and authorizes him, upon an order of a court of competent jurisdiction, to sell or compound bad or doubtful debts; to sell the real or personal property of the

bank, and, if necessary, in order to pay its debts, to enforce the individual liability of its stockholders, and it directs him to pay over all moneys thus received to the Treasurer of the United States, subject to the order of the Comptroller of the Currency. It also requires the Comptroller, upon appointing a receiver, to cause notice to be published, calling upon all persons having claims against the bank to present the same, with legal proof thereof. It then declares as follows, in sect. 5236: "From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver, on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.

This section provides for the distribution of the entire assets of the bank, giving no preference to any claim except for moneys to reimburse the United States for advances in redeeming the notes. When this reimbursement is fully provided for, the balance of the assets, as the proceeds are received, is subject to a ratable dividend on all claims proved to the satisfaction of the receiver, or adjudicated by a court of competent jurisdiction. Any sum remaining after the payment of all these claims is to be handed over to the stockholders in proportion to their respective shares. These provisions could not be carried out if the United States were entitled to priority in the payment of a demand not arising from advances to redeem the circulating notes. The balance, after reimbursement of the advances, could not be distributed, as directed, by a ratable dividend to all holders of claims; that is, to all creditors.

These provisions must be deemed, therefore, to withdraw national banks, which have failed, from the class of insolvent persons out of whose estates demands of the United States are to be paid in preference to the claims of other creditors. The

law of 1797, re-enacted in the Revised Statutes, giving priority to the demands of the United States against insolvents, cannot be applied to demands against those institutions. The provisions of that law and of the national banking law being, as applied to demands against national banks, inconsistent and repugnant, the former law must yield to the latter, and is, to the extent of the repugnancy, superseded by it. The doctrine as to repugnant provisions of different laws is well settled, and has often been stated in decisions of this court. A law embracing an entire subject, dealing with it in all its phases, may thus withdraw the subject from the operation of a general law as effectually as though, as to such subject, the general law were in terms repealed. The question is one respecting the intention of the legislature. And although as a general rule the United States are not bound by the provisions of a law in which they are not expressly mentioned, yet if a particular statute is clearly designed to prescribe the only rules which should govern the subject to which it relates, it will repeal any former one as to that subject. *Daviess* v. *Fairbairn*, 3 How. 636; *United States* v. *Tynen*, 11 Wall. 88.

In addition to these conflicting provisions in the banking law, necessarily superseding those of the law of 1797, as to the priority of the United States in the payment of their demands out of the estates of insolvents, there is the significant declaration of the banking law, that for any deficiency in the proceeds of the bonds deposited as security for the circulating notes of the bank the United States shall have a paramount lien upon all its assets, which shall be made good in preference to all other claims, except for costs and expenses in administering the same. This declaration was unnecessary and quite superfluous if for such deficiency the United States already possessed, under the act of 1797, the right to be paid out of the assets of the bank in preference to the claims of other creditors. The declaration considered in connection with the ratable distribution of the assets, prescribed after such deficiency is provided for, is equivalent to a declaration that no other priority in the distribution of the proceeds of the assets is to be claimed.

This view of the banking law is not affected by the subsequent enactment in 1867 of the Bankrupt Act, giving priority

to the demands of the United States against the estates of bankrupts. That enactment was dealing with the estates of persons adjudged to be insolvent under that law, and covers only the distribution of their estates. It has no further reach.

It remains only to consider whether the United States have the right to claim the payment of this demand out of the surplus moneys remaining in the treasury of the proceeds of the bonds deposited as security for the circulating notes of the bank. The surplus is sufficient to pay the demand of the United States in full. Can the United States set off their demand against these proceeds? We have no hesitation in answering this question in the negative. The bonds were received in trust as a pledge for the payment of the circulating notes. The statute so declares in express terms. Rev. Stat., sects. 5162 and 5167. They were to be returned to the bank when the notes were paid, if not sold to reimburse the United States for moneys advanced to redeem the notes. The bank could have claimed their return at any time upon a surrender of the notes. The surplus constituted the assets of the bank, and part of the fund appropriated by the statute for its creditors. It was charged with this liability, and was held subject to it after the purposes of the original trust were accomplished, although remaining in the treasury. It was then subject to a new trust. A trustee cannot set off against the funds held by him in that character his individual demand against the grantor of the trust. Courts of equity and courts of law will not allow such an application of the funds so long as they are affected by any trust. It would open the door to all sorts of chicanery and fraud. The fund must be relieved from its trust character before it can be treated in any other character.

This doctrine is well illustrated in the case of *Sawyer* v. *Hoag*, 17 Wall. 611, 622. There a stockholder indebted to an insolvent corporation for unpaid shares undertook to set off against the claim upon him a debt due to him by the corporation. But it was held that this could not be done. Said the court, speaking by Mr. Justice Miller: "The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the

appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally in equity to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim."

Here the surplus, being a fund for all the creditors, was subject to be distributed to them immediately upon the reimbursement of the advances of the United States, and the right of the creditors to it was not affected by the fact that it was at the time in the actual possession of the Treasury Department.

Nor is the relation of the United States to this fund changed by the forfeiture of the bonds, which the Comptroller of the Currency was authorized upon the failure of the bank to declare. The forfeiture was not a confiscation of the bonds to the government. It amounted only to an appropriation of them, against any other claim, to the specific purposes for which they had been deposited, authorizing their cancellation at market value when not above par, or their sale, so far as necessary to redeem the circulation or reimburse the United States for moneys advanced for that purpose. When that purpose was accomplished, the bank had the right to any surplus of their proceeds, equally as though that right had been in express terms declared.

It follows from the views expressed that the decree of the court below must be reversed, and the cause be remanded with directions to sustain the demurrer and dismiss the bill; and it is

So ordered.

WABASH RAILWAY COMPANY v. MCDANIELS.

1. This court will not re-examine the order of the Circuit Court, refusing to set aside the verdict upon the ground that the jury awarded excessive damages.
2. The same degree of care which a railroad company should take in providing and maintaining its machinery must be observed in selecting and retaining its employés, including telegraphic operators. Ordinary care on its part implies, as between it and its employés, not simply the degree of diligence which is customary among those intrusted with the management of railroad property, but such as, having respect to the exigencies of the particular service, ought reasonably to be observed. It is such care as, in view of the consequences that may result from negligence on the part of employés, is fairly commensurate with the perils or dangers likely to be encountered.

ERROR to the Circuit Court of the United States for the District of Indiana.

This was an action by McDaniels against the Wabash Railway Company to recover damages for injuries he sustained by reason of a collision of two of its freight trains, which took place on the night of Aug. 17, 1877, near Wabash, Indiana. There was a verdict in his favor. The court refused to set it aside, and, judgment having been rendered thereon, the company brought this writ of error.

The company was a common carrier, and the plaintiff a brakeman in its service at and before that date. When injured, he was at his post of duty on one of the colliding trains. The collision, it is conceded, was the direct result of negligence on the part of McHenry, a telegraphic night-operator of the defendant assigned to duty at a station on the line of its road, who was asleep when a train passed that station. Being ignorant, for that reason, that it had passed, he misled the train despatcher at Fort Wayne as to where it was at a particular hour of the night. In consequence of the erroneous information thus conveyed, the trains were brought into collision, whereby the plaintiff lost his leg, and was otherwise seriously and permanently injured.

The action proceeded mainly upon the ground that McHenry, a telegraphic operator in the service of the company, was incompetent for the work in which he was engaged, and that the

fact was known to the company at, before, and during the time of his employment.

The essential facts bearing upon the question of the company's negligence in employing McHenry are correctly summarized in one of the paragraphs of the charge to the jury. They are: —

"The tenth night after McHenry went on duty as night operator he went to sleep at his post of duty with the result already stated. He was seventeen years old but a few weeks before this employment. In June, 1876, he went into the service of the defendant, at Wabash, as a messenger boy, and continued in that service some twelve months, during which time he was instructed by Waldo, the day operator in the art of telegraphy. For this instruction Waldo exacted and received, as compensation, McHenry's wages, $10 per month. For a month or more before McHenry's employment as night operator he worked in the country, harvesting. The only knowledge that he had of telegraphy was what he acquired under Waldo, and before taking charge as night operator he had never been employed anywhere or in any capacity as operator. He was not competent, as he told you, to take press reports, but was competent, as he thought, and as Waldo and Wade (the latter his predecessor as night operator) thought, to do ordinary business, and to discharge the duty of night operator at Wabash; his habits were good, and he was bright and industrious. Waldo had recommended McHenry to Simpson, the chief train-despatcher at Fort Wayne, as capable and faithful, and without knowing McHenry personally, or even seeing him, and, on Waldo's recommendation and what Simpson knew of McHenry's skill from having occasionally noticed at Fort Wayne his fingering the key at Wabash, Simpson directed Waldo to employ McHenry at $50 a month, or, according to Waldo's testimony, he was directed by Mr. Simpson to put McHenry in charge of the office. McHenry's father told Waldo, before the son entered on the discharge of his duties, that Waldo should have $10 a month of the son's wages if Waldo would continue to give the son attention; to which Waldo assented. This is the father's testimony. Waldo admits that the father made the proposition to him as stated, but says

he replied that the son was competent to take charge of the office and run it without assistance. Boys no older than McHenry had successfully discharged the duties of day and night despatcher on this and other roads, and it seems to have been the custom of the company to educate its telegraph operators while serving as messenger boys. Other railroad companies, it seems from the evidence, have pursued the same course with satisfactory results."

The case was argued by *Mr. Wager Swayne* for the plaintiff in error, and by *Mr. E. E. McKay* for the defendant in error.

MR. JUSTICE HARLAN, after stating the facts, delivered the opinion of the court.

That we are without authority to disturb the judgment upon the ground that the damages are excessive cannot be doubted. Whether the order overruling the motion for a new trial based upon that ground was erroneous or not, our power is restricted to the determination of questions of law arising upon the record. *Railroad Company* v. *Fraloff*, 100 U. S. 24.

We also remark, before entering upon the consideration of the matters properly presented for determination, that it is unnecessary to express any opinion upon the question whether the plaintiff and McHenry were fellow-servants, within the meaning of the general rule that the servant takes the risks of dangers ordinarily attending or incident to the business in which he voluntarily engages for compensation, including the carelessness of his fellow-servants. The plaintiff took no exception to the instructions, which proceeded upon the ground that he and McHenry were fellow-servants, and that in accepting employment from the company they risked the negligence of each other in the discharge of their respective duties. As no such question can arise upon the present writ of error, we pass to the examination, as well of the instructions to which the defendant excepted, as of those asked by it which the court refused to give.

The court charged the jury, in substance, that the position of a telegraphic night-operator upon the line of a railroad was one of great responsibility, the lives of passengers and employés on trains depending upon his skill and fidelity; that

the company "was bound to exercise proper and great care to get a person in all respects fit for the place;" that while the defendant did not guarantee to its servants the skill and faithfulness of their fellow-servants, its duty was "to use all proper diligence in the selection and employment of a night operator," and to discharge him, after being employed, if it learned, or had reason to believe, he was incompetent or negligent; that the plaintiff had a right to suppose that the company "would use proper diligence in the selection of its telegraphic operators and all other employés whose incapacity or negligence might expose him to dangers, in addition to those which were naturally incident to his employment;" that "what will amount to proper diligence on the part of the master in the selection of a servant for a particular duty will in part depend on the character and responsibility of that duty;" that "the same degree of diligence which is required in the employment of a locomotive engineer would not be required in the employment of a fireman;" that "sound sense and public policy require that railroad companies should not be exempt from liability to their employés for injuries resulting from the incompetency or negligence of co-employés, when, by the exercise of proper diligence, such injuries might be avoided;" that the presumption is that the defendant "exercised proper diligence in the employment of McHenry, and the burden of proof of showing the contrary is upon the plaintiff;" but, "if from any cause McHenry was not a fit person to be intrusted with the responsible duties of night operator, and the defendant knew that fact, or by reasonable diligence might have known it, it is liable, for it is admitted that the plaintiff's injuries were the direct result of McHenry's negligence, and there is no proof that the plaintiff contributed to the accident by his own negligence."

To each of these instructions the defendant excepted at the time, and in proper form.

Among those asked by the company, and for the refusal to give which error is assigned, is one which presents the distinction between the propositions of law presented to the jury for its guidance, and those which the railroad company requested to be given.

It is as follows: —

"Although McHenry may have been and was guilty of negligence, and that negligence may have caused and did cause the collision which resulted in the injury to the plaintiff complained of, still the plaintiff cannot recover in this action unless it appears from the evidence that the defendant was guilty of negligence either in the appointment of said McHenry or in retaining him in his position; and to establish such negligence on the part of the defendant, not only the incompetency of said McHenry must be shown, but it must be shown that defendant failed to exercise ordinary care or diligence to ascertain his qualifications and competency prior to his appointment, or failed to remove him after his incompetency had come to the notice of the defendant or to some agent or officer of defendant having power to remove said McHenry."

The court modified this instruction by striking out the word "ordinary" in the only place where it occurred, and inserting in lieu thereof the word "proper." Thus modified the instruction was granted, the defendant excepting, at the time, to the refusal to give the instruction in the form presented.

The main contention of the defendant is that the jury were instructed that the duty of the company was to observe "proper and great care," when they should have been instructed that only ordinary care was required in the appointment and retention of its employés. The former degree of care, it is contended, is matter of opinion upon a question of law, while the latter is a question of fact. And the argument of counsel is, that the question of ordinary care is to be determined by the usages or custom which obtain in railroad management, and, therefore, the proper inquiry is not what ought to be, but what is, the general practice in that business; that what the servant is presumed to know, and to have accepted as the basis of his employment, is the practice or custom as it is when, in hiring his services, he risks the dangers incident to his employment; that the law presumes that master and servant alike contract with reference to that which is equally within their observation and inquiry; consequently, the company was required, in the selection of plaintiff's fellow-servants, whose negligence might endanger his personal safety, not to observe "proper and great"

(which counsel insists mean peculiar) care, but only that degree of diligence which the general practice and usage of railroad management sanctioned as sufficient.

In *Hough* v. *Railway Company*, 100 U. S. 213, it was decided that among the established exceptions to the general rule as to the non-liability of the common employer to one employé for the negligence of a co-employé in the same service, is one which arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master; that the master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or other instrumentalities adequately safe for use by the latter; and that it is implied in the contract between the master and the servant, that, in selecting physical means and agencies for the conduct of the business, the master shall not be wanting in proper care. It was further said that the obligation of a railroad company, in providing and maintaining, in suitable condition, machinery and apparatus to be used by its employés, is the more important, and the degree of diligence in its performance the greater, in proportion to the dangers which may be encountered; and that "its duty in that respect to its employés is discharged when, but only when, its agents, whose business it is to supply such instrumentalities, exercise due care as well in their purchase originally as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employés."

These observations, as to the degree of care to be exercised by a railroad corporation in providing and maintaining machinery for use by employés, apply with equal force to the appointment and retention of the employés themselves. The discussion in the adjudged cases discloses no serious conflict in the courts as to the general rule, but only as to the words to be used in defining the precise nature and degree of care to be observed by the employer. The decisions, with few exceptions, not important to be mentioned, are to the effect that the corporation must exercise ordinary care. But according to the

best-considered adjudications, and upon the clearest grounds of necessity and good faith, ordinary care, in the selection and retention of servants and agents, implies that degree of diligence and precaution which the exigencies of the particular service reasonably require. It is such care as, in view of the consequences that may result from negligence on the part of employés, is fairly commensurate with the perils or dangers likely to be encountered. In substance, though not in words, the jury were so instructed in the present case. That the court did not use the word "ordinary" in its charge is of no consequence, since the jury were rightly instructed as to the degree of diligence which the company was bound to exercise in the employment of telegraphic night-operators. The court correctly said that that was a position of great responsibility, and, in view of the consequences which might result to employés from the carelessness of telegraphic operators, upon whose reports depended the movement of trains, the defendant was under a duty to exercise "proper and great care" to select competent persons for that branch of its service. But that there might be no misapprehension as to what was in law such care, as applicable to this case, the court proceeded, in the same connection, to say that the law presumed the exercise by the company of proper diligence, and unless it was affirmatively shown that the incapacity of McHenry when employed, or after his employment and before the collision, was known to it, or by reasonable diligence could have been ascertained, the plaintiff was not entitled to recover. Ordinary care, then, — and the jury were, in effect, so informed, — implies the exercise of reasonable diligence, and reasonable diligence implies, as between the employer and employé, such watchfulness, caution, and foresight as, under all the circumstances of the particular service, a corporation controlled by careful, prudent officers ought to exercise.

These observations meet, in part, the suggestion made by counsel, that ordinary care in the employment and retention of railroad employés means only that degree of diligence which is customary, or is sanctioned by the general practice and usage, which obtains among those intrusted with the management and control of railroad property and railroad em-

ployés. To this view we cannot give our assent. There are general expressions in adjudged cases, which apparently sustain the position taken by counsel. But the reasoning upon which those cases are based is not satisfactory, nor, as we think, consistent with that good faith which, at all times, should characterize the intercourse between officers of railroad corporations and their employés. It should not be presumed that the employé sought or accepted service upon the implied understanding that they would exercise less care than that which prudent and humane managers of railroads ought to observe. To charge a brakeman, when entering the service of a railroad company, with knowledge of the degree of care generally or usually observed by agents of railroad corporations in the selection and retention of telegraphic operators along the line traversed by trains of cars — a branch of the company's service of which he can have little knowledge, and with the employés specially engaged therein he can ordinarily have little intercourse — is unwarranted by common experience. And to say, as matter of law, that a railroad corporation discharged its obligation to an employé — in respect of the fitness of co-employés whose negligence has caused him to be injured — by exercising, not that degree of care which ought to have been observed, but only such as like corporations are accustomed to observe, would go far towards relieving them of all responsibility whatever for negligence in the selection and retention of incompetent servants. If the general practice of such corporations in the appointment of servants is evidence which a jury may consider in determining whether, in the particular case, the requisite degree of care was observed, such practice cannot be taken as conclusive upon the inquiry as to the care which ought to have been exercised. A degree of care ordinarily exercised in such matters may not be due, or reasonable, or proper care, and therefore not ordinary care, within the meaning of the law.

It is further objected to the charge that the court below confounded the degree of care owed as a duty to passengers with the degree of care to be observed in the case of employés. This objection necessarily rests upon the assumption that the instruction as to the exercise of "proper and great care" in the

selection of telegraphic night-operators accurately stated the degree of diligence to be observed as between the railroad company and passengers. But clearly the statement in the charge that the lives of both passengers and employés depended upon the skill and fidelity of telegraphic operators, employed by the corporation in connection with the movement of its trains, was not for the purpose of indicating, with legal precision, the degree of care upon which passengers could rely in all matters affecting their safety. They, at least, have the right to expect the highest or utmost, not simply a great degree of diligence on the part of passenger carriers and all persons employed by them. The reference, therefore, to passengers, in the instructions alluded to, was not calculated to make the impression that employés could count upon the same degree of care that is required by law towards passengers. Whether in the selection and retention of telegraphic operators, upon whose capacity and watchfulness largely depends the personal safety of employés on trains, a corporation should or not exercise the same degree of care which must be observed in the case of passengers, it is not necessary now to consider or determine. It is sufficient to say that the corporation was bound, in the appointment and retention of such operators, to observe, as between it and its employés, at least the degree of care indicated in the charge to the jury.

Among the instructions asked in behalf of the company, the refusal to give which is the basis of one of the assignments of error, is the following: —

"To render the carelessness of said McHenry the carelessness of the defendant, or to render the defendant liable for the same, it is incumbent on the plaintiff to prove that said McHenry was appointed to or retained in his position as telegraph operator with knowledge on the part of the company, or some officer or agent of the company having the power of appointment or removal, that he was incompetent, or that such knowledge might have been obtained by the use of reasonable diligence on the part of the defendant, or of such officer or agent of the defendant."

It is now complained that the refusal to give this instruction was practically a declaration to the jury that the company was

responsible for knowledge which it had through any of its agents or through its agents generally; whereas it was liable only for the negligence or omission of those of its agents who were charged with the duty of selecting and controlling its employés and its general business. It is sufficient to say that this point — assuming the instruction in question to be correct — was covered by the last clause of the instruction to which our attention was first directed, and in terms quite as favorable to defendant as it was entitled to under the law. The court, in that instruction, expressly said that to establish the alleged negligence, not only the incompetency must be shown, "but it must be shown that the defendant failed to exercise proper care or diligence to ascertain his qualifications and competency prior to his appointment, or failed to remove him after his incompetency had come to the notice of defendant or to some agent or officer of defendant having power to remove said McHenry."

It is not necessary to further extend the discussion of the questions pressed upon our consideration. We are of opinion that the case, in all of its aspects, was fairly placed before the jury in the instructions given by the court. No substantial error of law was committed to the prejudice of the company.

Judgment affirmed.

BALDWIN v. STARK.

1. This court has jurisdiction to re-examine the judgment of the Supreme Court of a State, rendered adversely to the right and title which a party to the suit specially sets up to land under a patent issued by the United States to another under whom he claims.
2. Where the Land Department rejected the claim of a party to pre-empt a tract of public land, it appearing from the evidence submitted that he had previously exercised the "pre-emptive right," — *Held*, that the finding of that fact by the department is conclusive.
3. A person is not entitled, under existing statutes, to more than one such "pre-emptive right," nor, after filing a declaratory statement for one tract, can he file such a statement for another tract.

ERROR to the Supreme Court of the State of Nebraska.

The case is stated in the opinion of the court.

Mr. G. M. Lambertson for the plaintiffs in error.

Mr. Samuel Shellabarger and *Mr. Jeremiah M. Wilson* for the defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Nebraska, and the jurisdiction of this court is questioned.

The substance of the original bill in the State court is, that in a contest for the right to enter a tract of land between Stark and Van Pelt, before the Land Department, the Secretary of the Interior erroneously decided in favor of Van Pelt, to whom a patent was issued; and the prayer of the bill is that Baldwin, who holds under Van Pelt, shall be decreed to hold the title in trust for Stark, and convey it to him, and be enjoined from further prosecuting an action of ejectment against plaintiff, which he has commenced for the land in controversy. That the decree which granted this relief denied to the plaintiffs in error the right which they asserted under the patent from the United States, and was a decision against the title so asserted, and is therefore within sect. 709 of the Revised Statutes, is too well settled by numerous similar cases decided in this court to admit of further question. *Johnson* v. *Towsley*, 13 Wall. 72; *Marquez* v. *Frisbie*, 101 U. S. 473; *Morrison* v. *Stalnaker*, 104 id. 213.

The case was tried in the State court upon the record of the proceedings before the land-office, including the evidence on which the patent was issued to Van Pelt in the contest between him and Stark, with a stipulation involving a few other unimportant matters.

That record shows that upon all the questions involved the department decided in favor of Stark, except one, which was that he was disqualified to make the pre-emption claim he was then prosecuting by reason of having previously exercised that right in regard to other lands.

Whether he had thus made a filing of a former declaratory statement was a question of fact much contested before the department, in regard to which Stark himself was sworn, as were also several other witnesses, and the record of the alleged filing was also produced. On all this evidence the Commis-

sioner of the General Land-Office decided that he *had* filed the previous declaration, and was, therefore, disqualified as a pre-emptor of the land now in controversy. On appeal to the Secretary of the Interior, this decision was affirmed, and Stark's claim was rejected and Van Pelt's allowed, and the patent issued to him.

The Supreme Court of Nebraska holds that the Land Department decided this question of fact erroneously, and that Stark never filed or made the former declaratory statement, that he was a qualified pre-emptor for the land patented to Van Pelt, and decrees a conveyance to him by Baldwin of the legal title vested by the patent. *Stark* v. *Baldwin*, 7 Neb. 114.

It has been so repeatedly decided in this court, in cases of this character, that the Land Department is a tribunal appointed by Congress to decide questions like this, and when finally decided by the officers of that department the decision is conclusive everywhere else as regards all questions of fact, that it is useless to consider the point further. Where fraud or imposition has been practised on the party interested, or on the officers of the law, or where these latter have clearly mistaken the law of the case as applicable to the facts, courts of equity may give relief; but they are not authorized to re-examine into a mere question of fact dependent on conflicting evidence, and to review the weight which those officers attached to such evidence. *Johnson* v. *Towsley*, 13 Wall. 72; *Gibson* v. *Chouteau*, id. 92; *Shepley* v. *Cowan*, 91 U. S. 330; *Marquez* v. *Frisbie*, 101 id. 473.

The case before us is a simple re-examination by the Supreme Court of Nebraska of the evidence on which the Commissioner of the Land-Office and the Secretary of the Interior decided that Stark had made a prior declaratory statement for the pre-emption of other land, and a reversal of that decision.

It is urged upon us that a written stipulation in the case describing what evidence shall be introduced, and the right to file written arguments, and that neither party shall be prejudiced by any defect in the pleadings, but that the case shall be decided on its merits, is a waiver of this point.

But Van Pelt, the real party in interest, became a party to the suit, in a court below, six months after this stipulation was

made between the counsel of Baldwin and of Stark, and is not bound by it. It would be strange, also, if in a case like this the right of the party to question the equitable jurisdiction of the court on the facts found did not belong to the merits of the case.

Some attempt is made to show that, under the decision of this court in *Johnson* v. *Towsley*, the objection to a double pre-emption does not apply except where the land is subject to entry by purchase. But the court was there speaking of the effect of such former filing of a declaration of intention under the act of 1841 on the rights afterwards asserted under the act of 1843. It is sufficient to say that both these acts, with all others on that subject, were consolidated in the Revised Statutes, and sect. 2261, which is a reproduction of the law in force when the rights of the parties here accrued, is positive that, when a party has filed his declaration of intention to claim the benefits of such provision (the right of pre-emption) for one tract of land, he shall not at any future time file a second declaration for another tract.

The decree of the Supreme Court of Nebraska must be reversed, and the cause remanded to that court, with directions to affirm the decree of the District Court for the County of Lancaster dismissing the bill; and it is

So ordered.

CLOSE *v.* GLENWOOD CEMETERY.

BORCHERLING *v.* GLENWOOD CEMETERY.

1. A cemetery company was incorporated in 1854 by an act of Congress which authorized it to purchase and hold ninety acres of land in the District of Columbia, and to receive gifts and bequests for the purpose of ornamenting and improving the cemetery; enacted that its affairs should be conducted by a president and three other managers, to be elected annually by the votes of the proprietors, and to have power to lay out and ornament the grounds, to sell or dispose of burial lots, and to make by-laws for the conduct of its affairs and the government of lot-holders and visitors; fixed the amount of the capital stock, to be divided among the proprietors according to their respective interests; and provided that the land dedicated to the purposes of a cemetery should not be subject to taxation of any kind, and

no highways should be opened through it, and that it should be lawful for Congress thereafter to alter, amend, modify or repeal the act. Presently afterwards thirty of the ninety acres were laid out as a cemetery, the cemetery was dedicated by public religious services, and a pamphlet was published, containing a copy of the charter, a list of the officers, an account of the proceedings at the dedication, describing the cemetery as "altogether comprising ninety acres, thirty of which are now fully prepared for interments," and the by-laws of the corporation, which declared that all lots should be held in pursuance of the charter. No stock was ever issued. But the owner of the whole tract, named in the charter as one of the original associates, and in the list published in the pamphlet as the president and a manager of the corporation, knowing all the above facts, and never objecting to the appropriation of the property as appearing thereby, for more than twenty years managed the cemetery, sold about two thousand burial lots, and gave to each purchaser a copy of the pamphlet, and a deed of the lot, signed by himself as president, bearing the seal of the corporation, and having the by-laws printed thereon. In 1877 Congress passed an act, amending the charter of the corporation, providing that its property and affairs should be managed, so as to secure the equitable rights of all persons having any vested interest in the cemetery, by a board of five trustees to be elected annually, three by the proprietors of lots owned in good faith upon which a burial had been made, and two by the original proprietors; and that of the gross receipts arising from the future sale of lots one-fourth should be annually paid by the trustees to the original proprietors and the rest be devoted to the improvement and maintenance of the cemetery. *Held*, that the act of 1877 was a constitutional exercise of the power of amendment reserved in the act of 1854; that the owner of the land was estopped to deny the existence of the corporation, the setting apart of the whole ninety acres as a cemetery, and the right of the lot-holders to elect a majority of the trustees; and that he was in equity bound to convey the whole tract to the corporation in fee, and to account to the corporation for three-fourths of the sums received by him from sales of lots since the act of 1877; and the corporation to pay him one-fourth of the gross receipts from future sales of lots.

2. Pending a bill in equity against the owner of land to compel a conveyance of the title, subject to certain rights of his in the rents and profits, a receiver appointed in another suit against him, and to whom he had by order of court in that suit assigned his interest in the land, applied to be and was made a defendant, and answered, and also filed a cross-bill against both the original parties, which was afterwards ordered to be stricken from the files, with leave for him to apply for leave to file a cross-bill; but he never applied for such leave. The case was heard upon pleadings and proofs, and a final decree entered ordering the original defendant to convey to the complainant, and the complainant to account to him or his assigns for part of the rents and profits, and that this decree be without prejudice to the rights of the receiver. *Held*, that the receiver was not aggrieved.

APPEALS from the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. J. Hubley Ashton and *Mr. Nathaniel Wilson* for Close.

Mr. Cortlandt Parker and *Mr. Walter D. Davidge* for Borcherling.

Mr. Thomas W. Bartley, *Mr. William F. Mattingly*, and *Mr. Jesup Miller* for the appellee.

MR. JUSTICE GRAY delivered the opinion of the court.

This is a bill in equity, filed on the 25th of October, 1877, by the Glenwood Cemetery, claiming to be a corporation established by act of Congress, against Joseph B. Close, William S. Humphreys, Randolph S. Evans and George Clendenin, praying for a conveyance of the legal title in a tract of land containing ninety acres, situated in the District of Columbia, known as the Glenwood Cemetery; and for an account. The bill was afterwards dismissed by consent as against Humphreys and Evans. The material facts, as shown by the proofs, are as follows: —

In June, 1852, Humphreys, for the sum of $9,000, bought of Junius J. Boyle the tract of land in controversy, and took from him a deed of it, and immediately set about preparing it for use as a cemetery. He enclosed with a high fence, and laid out with drives and walks, and improved and embellished, thirty acres of it, leaving the other sixty acres in their original unimproved condition; and in March, 1853, put Clendenin in charge as superintendent. Humphreys conveyed to Close an undivided half of the premises in April, 1853, and the whole tract in June, 1854. The two deeds were absolute in form, but were, in fact, intended as security; the first for the repayment of $20,000, advanced to Humphreys by Close, for the purpose, as Close knew, of converting the estate into a cemetery; and the second for the repayment of other advances to the amount of $7,000, already made to him by Close, for the same purpose, and of subsequent like advances, of the amount of which there is no evidence but Close's own vague and unsatisfactory testimony, unsupported by books or vouchers; and the parties agreed in writing that if Humphreys should meet his obligations, he should have back one-half of the land. Humphreys thenceforward managed the property, acting for himself and Close, through Clendenin as superintendent, until September,

1859, when, having failed to meet his engagements, he relinquished all his interest in the property to Close, and Close became sole owner, and assumed control of the property, retaining Clendenin as his superintendent to manage the cemetery.

On the 27th of July, 1854, Congress passed an act entitled "An Act to incorporate the proprietors of Glenwood Cemetery," by which twelve persons named, eight of them residents of the District of Columbia, and the other four being Close and William Phelps, (since deceased,) residents of New Jersey, and Humphreys and Evans, residing in New York, were created a corporation by the name of "The Proprietors of Glenwood Cemetery in the District of Columbia," and were empowered "to purchase and hold not exceeding one hundred acres of land in the District of Columbia, north of the limits of the City of Washington; to sell and dispose of such parts of said land as may not be wanted for the purpose of a cemetery, provided that at least thirty contiguous acres shall be forever appropriated and set apart as a cemetery; with authority to said corporation to receive gifts and bequests for the purpose of ornamenting and improving said cemetery;" and it was enacted that the affairs of the corporation should be conducted by a president and three managers, to be "elected annually by a majority of the votes of the proprietors," and "each proprietor entitled to one vote for each share held by him," and that until the first election the four last-named persons should be managers; that the president and managers should have power, among other things, "to lay out and ornament the grounds," "to lay out and sell or dispose of burial lots," and "to make such by-laws, rules and regulations as they may deem proper for conducting the affairs of the corporation, for the government of lot-holders and visitors to the cemetery, and for the transfer of stock and the evidence thereof;" that "the capital stock of said company shall be represented by two thousand shares of fifty dollars each, divided among the proprietors according to their respective interests, and transferable in such manner as the by-laws may direct;" that "no streets, lanes, alleys, roads, or canals of any sort shall be opened through the property of said corporation, exclusively used and appropriated to the purpose of a cemetery; provided, that nothing herein

contained shall authorize said corporation to obstruct any public road or street or lane or alley now actually opened and used as such;" that any person wilfully destroying, injuring or removing any tomb, monument, gravestone, fence, railing, tree or plant within the limits of the cemetery, should be considered guilty of a misdemeanor; that "each of the stockholders in the said company shall be held liable in his or her individual capacity for all the debts and liabilities of the said company, however contracted or incurred;" that "burial lots in said cemetery shall not be subject to the debts of the lot-holders thereof, and the land of the company dedicated to the purposes of a cemetery shall not be subject to taxation of any kind;" that a certificate, under seal of the corporation, of the ownership of any lot, should have the same effect as a conveyance of real estate; and that "it may be lawful for Congress hereafter to alter, amend, modify or repeal the foregoing act." 10 Stat. 789.

On the 2d of August, 1854, the ceremony of dedicating the cemetery by appropriate religious services and addresses was performed on the spot in the presence of a number of people. Immediately afterwards a pamphlet was published and generally circulated, containing a copy of the charter, a list of the officers, including Close, Phelps, Humphreys and Evans, managers, Close, president, Humphreys, treasurer, and Clendenin, superintendent; a full account of the proceedings at the dedication, in which the property was spoken of as set apart and consecrated for the burial of the dead, and as "altogether comprising ninety acres, thirty of which are now fully prepared for interments;" and the by-laws of the cemetery, of which the first was, "All lots shall be held in pursuance of 'An Act to incorporate the Proprietors of Glenwood Cemetery,' approved July 27, 1854, and shall be used for the purposes of sepulture alone."

Close soon after received a copy of this pamphlet from Humphreys, and from that time to the filing of the bill never objected to the appropriation of the property in the manner appearing thereby. In the course of the next twenty years, about two thousand lots were sold, and each purchaser was given a copy of the pamphlet, and a certificate or deed of his

lot, signed by Close as president, bearing the seal of the company, and having the by-laws printed thereon. The gross receipts from the time of the opening of the cemetery to 1876 were $160,000. No stock was ever issued as provided in the charter.

No taxes were ever paid on any part of the ninety acres. At different times from 1871 to 1876, taxes were assessed, or proposed to be assessed, by the municipal authorities, upon the sixty acres which had not been improved. But Close and Clendenin, by representing to the assessors and collector that the whole tract had been dedicated to burial purposes in accordance with the charter, and by exhibiting to them the charter and the pamphlet containing the account of the dedication, induced them to recognize the exemption of the whole tract from taxation.

On the 28th of February, 1877, Congress passed an act, amending the act of the 27th of July, 1854; changing the name of the corporation to "The Glenwood Cemetery;" providing that its property and affairs should be under the control of a board of five trustees, any three of whom should be a quorum, to be elected annually, "three by the proprietors of lots in said cemetery" (each to be "entitled to one vote for each lot owned by him in good faith, upon which a burial has been made") "and two by the original proprietors," and to have authority to fill temporary vacancies in the board; that these trustees should so conduct the affairs of the cemetery "as to secure the equitable rights of each and every person having in any way any vested interest in the said cemetery; and the cemetery shall be amenable and subject to the jurisdiction of the equity courts of the District of Columbia for any disregard of the rights or interests of any person whatsoever;" that "the words 'the proprietors,' where they occur in the original act of incorporation hereby amended, shall be interpreted and construed to mean and shall signify the proprietors of lots in said cemetery, and which is hereby now declared by this amendment to be the true intent and meaning of said words;" and that, of the gross receipts arising "from the sale of lots hereafter sold of the ground now dedicated to burial purposes," one-fourth should be annually paid by the trustees to the original

proprietors, and the rest be devoted to the improvement and maintenance of the cemetery. 19 Stat. 266.

Pursuant to this act, the owners of lots chose three trustees, who, on the refusal of Close to recognize the corporation as existing, or to appoint two other trustees, filled up the vacancies in the board, and, on the refusal of Close, and of Clendenin as his agent, to deliver up possession to them, filed this bill to compel a conveyance of the legal title and a delivery of possession of the whole tract, and an account of the proceeds of any lots sold since the organization under the act of 1877.

The defences set up by Close and Clendenin, in their answers and at the argument, are that there never was any acceptance of the act of 1854, or formal organization of the corporation under it, but the property remained the private property of Close, except such lots as had been sold, for which he was ready to give a legal title to the holders; that the act of 1877 was unconstitutional and void, as depriving him of his property without adequate compensation; and that no part of the sixty acres not enclosed was ever dedicated to the purposes of a cemetery in such a way as to interfere with his absolute control over it.

After Close and Clendenin had put in their answers, Charles Borcherling filed a petition to be admitted as a defendant to the bill, alleging that he had been appointed receiver under a decree for alimony rendered in a suit for divorce brought against Close by his wife in the Court of Chancery of New Jersey, and that, in obedience to an order of that court, Close had executed to him as such receiver an assignment of all his personal estate, the rents and profits of his real estate, and "especially the capital stock of the Glenwood Cemetery in Washington in the District of Columbia, and all profits, dividends or other moneys to me coming therefrom, or from any office thereof." This petition of Borcherling was granted, and he filed an answer to the original bill, setting up these facts. He also filed a cross-bill, praying that Close convey the title in the cemetery to the corporation, and that the corporation issue and deliver to Borcherling as receiver as aforesaid stock to the amount of one hundred thousand dollars. On motion of Close and Clendenin, the court afterwards ordered the cross-bill of

Borcherling to be stricken from the files, with leave to him to apply for leave to file a cross-bill. He never applied for such leave. But the corporation filed a general replication to the answers of Close, Clendenin and Borcherling, proofs were taken, and the case was heard and decided upon the merits.

By the final decree of the court below, it was adjudged that Close convey the whole tract of ninety acres to the plaintiff corporation in fee-simple; that Close and Clendenin deliver to the plaintiff all books, plans, records and personal property, belonging to or used in connection with its business, and be perpetually enjoined from interfering with or obstructing the plaintiff in the possession and management of the cemetery; and the court being further of opinion that Close was entitled to be compensated for the transfer of his title in the land as the original proprietor thereof, and that the provision made for this object by the act of Congress of 1877 was an equitable adjustment of the rights of Close, and a reasonable compensation for his title and interest in the property, both in amount and in mode of payment, regard being had to the needs of the cemetery, it was further adjudged that the plaintiff annually hereafter account for and pay to him or his assigns one-fourth of the gross receipts from sales to be made of lots in the cemetery; and that an account be taken of his receipts from the cemetery since the act of 1877 took effect, and that he be charged in favor of the plaintiff with all sums, over and above one-fourth of the gross receipts from sales of lots, which had been applied to his own use and not properly disbursed on account of the cemetery, and that he pay the costs of suit; and that this decree be without prejudice to the claims of Borcherling as receiver as aforesaid.

From that decree appeals have been taken and argued by Close and Clendenin and by Borcherling.

The appeal of Borcherling may be briefly disposed of. The order striking his cross-bill from the files reserved leave to him to apply to the court for leave to file a cross-bill. He never made any such application, but, after replication filed to the answers of himself and of the other defendant, suffered proofs to be taken upon the issues so made up, and the case to proceed

to a final decree; and the final decree is expressed to be made without prejudice to his rights as receiver. Under these circumstances, there is nothing in the proceedings of the court below prejudicial to those rights, or which entitles him to a reversal of the final decree and to a reopening of the whole case.

Upon the merits of the case, as presented by the appeal of Close and Clendenin, it will be convenient to consider first the question whether, assuming that the charter granted by Congress in 1854 must be held to have been duly accepted by the corporation, and the corporation to have been legally organized under it, the act of 1877 is within the power of alteration, amendment and repeal, reserved to Congress in the original charter.

The terms of that charter show that it was not intended to create a mere land company, for the exclusive benefit of the original associates and their successors holding shares in the stock of the corporation; but that the ultimate and principal object was to establish and permanently maintain a cemetery for the burial of the dead, which, if not a strictly charitable use, is in some aspects a pious and public use, and was evidently so regarded by Congress. If the corporation were to be exclusively a private business corporation, created for the sole benefit of the original associates and their successors as holders of shares, Congress would hardly have inserted in the charter the provision authorizing the corporation to receive gifts and bequests for the purpose of ornamenting and improving the cemetery, or the provisions exempting the property from all taxation, and prohibiting the future laying out of any public ways through it.

At first, indeed, the whole immediate benefit derived from the property would be that resulting to the shareholders from the sale of lots, by way of dividend out of so much of the moneys received as might not be needed to be expended or reserved for the laying out, ornamenting and maintenance of the cemetery. But as fast as lots were sold, the property and interest of those purchasing and holding the land for its ultimate use of the permanent burial of the dead would increase, and the interest of the original associates would diminish. The

profits to be derived from the sale of the land would cease, as to each parcel, as soon as it was sold for a burial lot. When the lots were all sold, the pecuniary interest of the associates or shareholders would disappear; but the duty to keep up the cemetery would remain, and the owners of lots would be the only persons having a peculiar interest in keeping it up. The corporation, in short, was established to secure and maintain, not merely the right of sale, but the right of burial, and was the representative, not only of the original proprietors of the land, but also of the subsequent purchasers of lots therein.

At the beginning, before any lots were sold, the owners of shares, divided among the proprietors according to their respective interests, would necessarily be the only persons concerned, or who could elect the officers of the corporation and managers of the cemetery. But with the gradual change of interest, resulting from the sale of lots, it was in full accord with the provisions of the charter, and best tended to carry out the main purpose of permanently maintaining a cemetery for the burial of the dead, that the holders of lots should take part in the election and so have a voice in the management.

After the cemetery had been laid out, improved and used for the burial of the dead for more than twenty years, and two thousand burial lots had been sold, it was a reasonable exercise of the reserved power of Congress to authorize the owners in good faith of lots upon which burials had been made, to elect a majority of the trustees, in whom should be vested the control and management of the cemetery, with a due regard to the equitable rights of all persons having any vested interest therein; and to provide that a portion only of the receipts arising from the future sale of lots should be paid to the original proprietors, and the rest be devoted to the improvement and maintenance of the cemetery. Every legislative act is to be presumed to be a constitutional exercise of legislative power until the contrary is clearly established; and there is nothing in the record before us to show that the proportion of one-fourth of the gross receipts from future sales of lots, which is fixed by the act of Congress of 1877 and by the decree of the court below, as a compensation for the title and interest of the original proprietors and associates, is not a reasonable one.

It follows that the act of Congress of 1877 must be deemed constitutional and valid, within the principle affirmed by this court in the case of *The Holyoke Dam*, that a power reserved to the legislature to alter, amend or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right. *Commissioners on Inland Fisheries* v. *Holyoke Water Power Co.*, 104 Mass. 446, 451; *Holyoke Company* v. *Lyman*, 15 Wall. 500, 522. In the exercise of such a power by the United States, as was observed by the Chief Justice in delivering the opinion of the court in the *Sinking Fund Cases*, "it is not only their right, but their duty, as sovereign, to see to it that the current stockholders do not, in the administration of the affairs of the corporation, appropriate to their own use that which in equity belongs to others." 99 U. S. 700, 725.

The question then recurs whether, as against Close, the corporation must be held to have been duly organized under the act of Congress of 1854.

Upon this question the facts are these: Close knew that the act of incorporation had been granted by Congress, in which he was named as one of the original associates; that the cemetery had been dedicated and set apart by public religious ceremonies for the burial of the dead; that a pamphlet had been published, containing a full account of those ceremonies, the names of a full board of officers, including himself as president and one of the managers, and Clendenin as superintendent, and a code of by-laws, by the very first of which all lots were to be held in pursuance of the act of incorporation and to be used for the purposes of sepulture alone. With full knowledge of these facts, Close, for more than twenty years, exercised through Clendenin the sole management of the cemetery, and issued deeds and certificates of burial lots to the number of more than two thousand, bearing the corporate seal, and his own signature as president of the corporation, and having the by-laws printed on them. Being himself the owner of the whole land, he dealt with it in all respects as if it belonged to

the corporation, and so represented it to the purchasers of lots. As no other person owned any part of the land or was entitled to a share in the corporation, the fact that no stock has been issued or divided is immaterial.

One who deals with a corporation as existing in fact is estopped to deny as against the corporation that it has been legally organized. And in a court of equity, at least, the owner of land, who stands by and sees it conveyed as belonging to another, cannot afterwards set up his own title against the grantee. The present case is yet stronger. Close did not merely deal with the corporation, and permit the corporation to convey parts of his land to purchasers of lots. But he himself assumed to act as the corporation, and himself made the conveyance, and the accompanying representations, to every purchaser.

By his acts he represented to the purchasers of lots that the cemetery had been created and the land was owned by the corporation under the charter of 1854, and, as a necessary consequence, that the corporation, and all rights derived from it, were subject to the provisions of that charter, including the reservation to Congress of the power of alteration, amendment or repeal. It is upon these representations that the purchasers of lots have acquired their title and have parted with their money; and the corporation, whose existence he, at least, cannot deny, has the right and the duty, as the representative and in behalf of all the purchasers of lots, to enforce against him the obligation which he has thereby assumed. He holds the fee of the cemetery in trust for the corporation, and is entitled to nothing, as against the corporation and those whom it represents, but such compensation for his interest as original proprietor or stockholder, as is consistent with the state of things which he has represented to exist.

It is argued by the learned counsel for the appellants that the estoppel and the obligation of Close cannot extend beyond the thirty acres which had been actually laid out. This argument appears to us to be fully met and answered in the able and thorough opinion of the court below, delivered by Mr. Justice Cox, who says: "It was held out to the lot-holders, not only that the ground immediately available for burial

should remain set apart for that object, but that the cemetery should be for ever under the protection of a perpetual corporation, charged with the duty of laying out and ornamenting the grounds, capable of receiving gifts and bequests, and empowered to make by-laws for the regulation of the affairs of the corporation; and the whole property was described as dedicated to the purposes of the cemetery, not necessarily that the whole should be laid out into lots, but that it should all belong to the institution and be available for its general objects. This was not to be a mere graveyard in which each lot-holder acquired a piece of ground in which to bury his dead, and at the same time become chargeable with the sole care of his particular lot; but the lot-holders themselves became subject to by-laws and regulations having reference to the institution as an entirety, and the perpetual preservation of the cemetery as an ornamental and convenient place for interment and for resort by the relatives of the dead." *Glenwood Cemetery* v. *Close*, 7 Washington Law Reporter, 214, 218.

Decree affirmed.

WILLIAMS *v.* JACKSON.

JACKSON *v.* STICKNEY.

1. By a trust deed, duly recorded, land was conveyed to the trustees in fee, and they were authorized to release it to the grantor upon payment of the negotiable promissory note thereby secured. Before that note was paid or payable, and after it had been negotiated to an indorsee in good faith for full value, a deed of release, reciting that it had been paid, was made to the grantor by the trustees and by the payee of the note, and recorded; and the grantor executed and recorded a like trust deed to secure the payment of a new note for money lent to him by another person, who had no actual notice that the first note had been negotiated and was unpaid, and who, before he would make the loan, required and was furnished with a conveyancer's abstract of title, showing that the three deeds were recorded and the land free from incumbrance. *Held*, that the legal title was in the trustee, under the second trust deed, and that the note thereby secured was entitled to priority of payment out of the land.
2. Upon a bill in equity by the holder of a debt secured by deed of trust, to set aside a release negligently executed by the trustee to the grantor, the complainant cannot have a decree for the payment of his debt by the trustee personally.

APPEALS from the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. W. Hallett Phillips, *Mr. William A. Maury*, and *Mr. Philip Phillips* for Williams; *Mr. James S. Edwards* and *Mr. Job Barnard* for Jackson; *Mr. John F. Hanna* and *James M. Johnston* for Stickney.

MR. JUSTICE GRAY delivered the opinion of the court.

This is a bill in equity, filed by Benjamin L. Jackson and others, partners under the name of Jackson, Brother & Company, and heard on the pleadings and proofs, by which the material facts appear to be as follows: —

On the 1st of January, 1875, Edwin J. Sweet and his wife purchased and took a deed from Augustus Davis of a house and land in Washington, and executed and acknowledged a trust deed thereof, in which they recited that they were indebted to Augustus Davis in the sum of $8,000 for deferred payments of the purchase-money, for which they had given him their four promissory notes of the same date and payable to his order, three for the sum of $1,833.33 each, and payable in one, two and three years respectively, and one for the sum of $2,500, payable in three years, and all bearing interest at eight per cent; and by which deed, in order to secure the payment of those notes as they matured, they conveyed the land to Charles T. Davis and William Stickney, and the survivor of them, their and his heirs and assigns, in trust to permit the grantors to occupy the premises until default in payment of principal or interest of the notes; and upon the full payment of all the notes and interest, and all proper costs, charges and commissions, to release and convey the premises to Mrs. Sweet, her heirs and assigns; with a power of sale upon default of payment, and a provision that the purchaser at the sale should not be bound to see to the application of the purchase-money. That deed of trust was recorded on the 14th of January, 1875.

The notes secured by that deed were indorsed by Augustus Davis and Charles T. Davis, had on the margin the printed words, "Secured by deed of trust," and were soon after their date transferred by the indorsers for full value and before

maturity to the plaintiffs, and have since been held by them, except the one due at the end of the first year, which was paid by the indorsers. Charles T. Davis was a son and a partner of Augustus Davis, and was a broker and real estate agent.

On the 15th of September, 1876, before any of the other notes fell due, and without the plaintiffs' knowledge, the trustees, Davis and Stickney, executed a deed of release of the land to Mrs. Sweet, reciting that the debt secured by the trust deed had been fully paid and discharged, as appeared by the signature of Augustus Davis, who joined in the execution of the release.

At or before the same time, Sweet and wife employed Charles T. Davis to make some arrangement by which they could take up those notes and give others running for a longer time; he went to Samuel T. Williams, and offered him the land unincumbered, as security for a loan of $5,000, payable in four years, and bearing nine per cent interest; and Williams agreed to make the loan if satisfied by a conveyancer's abstract of title that the land was free of all incumbrance, but not otherwise.

On the 27th of September, 1876, a deed of trust, containing provisions like those in the first deed of trust, was executed by Sweet and wife to Robert K. Elliott and Charles T. Davis to secure the payment of a note for $5,000 in four years to Williams, with interest at the rate of nine per cent. On the 28th of September, the deed of release and the second deed of trust were recorded; Charles T. Davis furnished Williams with certificates of a conveyancer that he had examined the title on the 14th of September and found it good, subject to the first trust deed, and again on the 28th, when the only changes were the release and the second deed of trust; and Williams thereupon gave to Davis his check, payable to Davis's order, for $5,000, (which Davis applied to his own use,) and received from him the note of Sweet and wife for the same amount and the trust deed to secure its payment. Neither Williams nor Sweet and wife then knew that, at the time of the execution of the release, Augustus Davis was not the holder of the notes secured by the first trust deed. On the 29th of September, Sweet and wife executed another trust deed to Charles T. Davis to secure the payment of six promissory notes to Augustus Davis for $530.26 each, payable at intervals of six months from their date.

On the 27th of July, 1877, the interest due on the note to Williams not having been paid, the trustees, Elliott and Davis, sold the land by auction for the sum of $6,325 to Eli S. Blackwood, who paid them $1,325 in cash (which was applied to the payment of the interest and of other charges) and gave them his note for $5,000, secured by a trust deed of the land.

The bill, which was against Williams, Sweet and wife, Augustus Davis and Blackwood in their own right, against Charles T. Davis and Stickney in their own right and as trustees, and against Elliott as trustee only, prayed that the release by Stickney and Charles T. Davis, as well as all the subsequent conveyances, might be declared void as against the first trust deed, and the trust created by that deed be declared to have priority over all subsequent incumbrances; that Charles T. Davis be removed from his trust and a new trustee be appointed in his stead; that the land be sold and the proceeds applied, under order of the court, to the payment of the notes held by the plaintiffs and of any other lawful claims; and for an injunction, a discovery, an account and further relief.

The judge before whom the case was first heard made a decree, declining to set aside the release or to declare that the first deed of trust had priority over the second; adjudging that the first deed of trust was fraudulently and negligently released by Augustus Davis and Charles T. Davis, and wrongfully and negligently released by Stickney, and therefore ordering that the plaintiffs recover against Augustus Davis, Charles T. Davis, Stickney, and Sweet and wife the amount due on the notes held by them, with interest; declaring that the note for $5,000 held by Williams was the first charge on the land; and ordering the land to be sold, and the proceeds to be distributed in paying off the incumbrances in the order thus established.

The court at general term reversed those parts of the decree which declined to set aside the release, and which declared that Williams was entitled to priority; and also that part which adjudged that the plaintiffs recover against Stickney the amount of their debt; affirmed it in other respects; and ordered the proceeds to be first applied to the payment of the plaintiffs' debt. Williams appealed from so much of this decree as gave

priority to the plaintiffs' claim; and the plaintiffs appealed from so much as reversed the decree against Stickney.

By the statutes regulating the conveyance of real estate in the District of Columbia, all deeds of trust and mortgages, duly acknowledged, take effect and are valid, as to all subsequent purchasers for valuable consideration without notice, and as to all creditors, from the time of their delivery to the recorder for record; whereas other deeds, covenants and agreements take effect and are valid, as to all persons, from the time of their acknowledgment, if delivered for record within six months after their execution. Any title-bond or other written contract in relation to land may be acknowledged and recorded in the same manner as deeds of conveyance; and the acknowledgment, duly certified, and the delivery for record, of such bond or contract, shall be taken and held to be notice of its existence to all subsequent purchasers. Rev. Stat. D. C., sects. 446, 447, 449.

The first deed of trust from Sweet and wife did not give the trustees merely a power to release the land on payment of the notes secured thereby, and to sell on default of payment; but it vested the legal title in them. A release of the land before payment of the notes would be a breach of their trust, and would be unavailing in equity to any one who had knowledge of that breach. *Insurance Company* v. *Eldredge*, 102 U. S. 545. But it would pass the legal title. *Taylor* v. *King*, 6 Munf. (Va.) 358; *Den* v. *Troutman*, 7 Ired. (N. C.) L. 155. The legal title in the land, being in the trustees under the first deed of trust, passed by their deed of release to Mrs. Sweet, and from her by the second deed of trust to the trustees for Williams.

The first deed of trust having been made to the trustees therein named for the benefit of Augustus Davis, and to secure the payment of the notes from the grantors to him; and the plaintiffs, upon the transfer and indorsement to them of those notes, having taken no precaution to obtain and put on record an assignment of his rights in such form as would be notice to all the world; the recorded deed of release, executed by him as well as by the trustees, reciting that the notes had been paid, and conveying the legal title, bound the plaintiffs, as well as himself, in favor of any one acting upon the faith of the record and ignorant of the real state of facts.

If the plaintiffs wished to affect subsequent purchasers with notice of their rights, they should have obtained a new conveyance or agreement, duly acknowledged and recorded, in the form either of a deed from the original grantors, or of a declaration of trust from the trustees, or of an assignment from Augustus Davis of his equitable interest in the land as security for the payment of the notes. The record not showing that any person other than Augustus Davis had any interest in the notes, or in the land as security for their payment, an innocent subsequent purchaser or incumbrancer had the right to assume that the trustees, in executing the release, had acted in accordance with their duty.

Williams is admitted to have had no actual knowledge that the notes secured by the first trust deed were held by the plaintiffs, or that they were unpaid. The knowledge of those facts by Charles T. Davis, through whom Williams made the loan, does not bind him, because upon the evidence Charles T. Davis appears not to have been his agent, but the agent of Sweet and wife.

Williams took every reasonable precaution that could have been expected of a prudent man, before advancing his money to Charles T. Davis for Sweet and wife. He declined to lend his money, until after he had been furnished with a conveyancer's abstract of title, showing that the deed of release from the trustees under the first deed of trust and from the original holder of the notes secured thereby, as well as the second deed of trust to secure the repayment of the money lent by Williams, had been recorded, and that the land was not subject to any incumbrance prior to the second deed of trust.

It was suggested in argument that as the first deed of trust showed that the notes secured thereby were negotiable and were not yet payable, and that the land was not intended to be released from this trust until all the notes were paid, Williams was negligent in not making further inquiry into the fact whether they were still unpaid. But of whom should he have made inquiry? The trustees under the first deed and the original holder of the notes secured thereby having expressly asserted under their own hands and seals that the notes had been paid, and Sweet and wife having apparently concurred in

the assertion by accepting the deed of release and putting it on record, he certainly was not bound to inquire of any of them as to the truth of that fact; and there was no other person to whom he could apply for information, for he did not know that the notes had ever been negotiated, and he had no reason to suppose that they had not been cancelled and destroyed.

To charge Williams with constructive notice of the fact that the notes had not been paid, in the absence of any proof of knowledge, fraud, or gross or wilful negligence, on his part, would be inconsistent with the purpose of the registry laws, with the settled principles of equity, and with the convenient transaction of business. *Hine* v. *Dodd*, 2 Atk. 275; *Jones* v. *Smith*, 1 Hare, 43, and 1 Phillips, 244; *Agra Bank* v. *Barry*, Irish R. 6 Eq. 128, and Law Rep. 7 H. L. 135; *Wilson* v. *Wall*, 6 Wall. 83; *Norman* v. *Towne*, 130 Mass. 52.

The equity of Williams being at least equal with that of the plaintiffs, the legal title held for Williams must prevail, and he is entitled to priority. The decree appealed from is in this respect erroneous and must be reversed.

But that decree, so far as it refuses relief against Stickney personally, is right. The main purpose of the bill is to set aside the deed of release and to satisfy the plaintiffs' debt out of the land. The attempt to charge Stickney with the amount of that debt, by reason of his negligence in executing the release, is wholly inconsistent with this. The one treats the release as void; the other assumes that it is valid. In the one view, Stickney is made a party in his capacity of trustee only; in the other, it is sought to charge him personally. The joinder of claims so distinct in character and in relief is unprecedented and inconvenient. *Shields* v. *Barrow*, 17 How. 130, 144; *Walker* v. *Powers*, 104 U. S. 245.

The result is that the decree appealed from must be reversed, and the case remanded with directions to enter a decree in conformity with this opinion, and without prejudice to an action at law or suit in equity against Stickney.

Decree reversed.

MR. JUSTICE HARLAN did not sit in this case, nor take any part in deciding it.

SUN MUTUAL INSURANCE COMPANY *v.* OCEAN INSURANCE COMPANY.

1. Where, in a suit in admiralty by one insurance company against another upon a contract of reinsurance, it became essential for the libellant to show that the risk which it had assumed was the same as that insured against by the policy sued on, and the Circuit Court asserted the identity of the insurances, not in the findings of fact, but as a conclusion of law, the question on appeal is not whether that might be true as a presumption or inference of fact from the circumstances stated in the findings, but whether, upon the facts found, it must be true as a matter of law.
2. The rule established in *United States* v. *Pugh*, 99 U. S. 265, as to findings of fact in cases from the Court of Claims, applies to appeals from decrees in admiralty, under the act of Feb. 16, 1875, c. 77.
3. It is the duty of the assured to communicate all material facts, and he cannot urge as an excuse for his omission to do so that they were actually known to the underwriters, unless the knowledge of the latter was as full and particular as his own information.
4. The exaction of information in some instances may be greater in a case of reinsurance than as between the parties to an original insurance. In the former, the party seeking to shift the risk he has taken is bound to communicate such information within his knowledge as would be likely to influence the judgment of an underwriter.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

This was a libel in admiralty, filed in the District Court of the United States for the Southern District of New York by The Ocean Insurance Company against The Sun Mutual Insurance Company, upon a policy of marine insurance. A decree dismissing the libel was rendered in that court, which, on appeal, was reversed by the Circuit Court, and a decree entered in favor of the libellant. From that decree the present appeal has been prosecuted.

The findings of fact made by the Circuit Court as the basis of its conclusions of law are as follows: —

1. At the several times hereinafter mentioned the libellant and the defendant were insurance companies engaged in the business of insuring against losses by perils of the sea. The libellant, to be referred to herein as The Ocean Company, was incorporated under the laws of the State of Maine, and had its principal place of business at Portland in that State. The

defendant, to be referred to as The Sun Company, was incorporated under the laws of the State of New York, and had its principal place of business in the city of New York.

2. On or about Jan. 19, 1864, The Sun Company issued its open policy, No. 51,564, to The Ocean Company in the usual form for the insurance of cargoes at and from Cuba to Boston or Portland; it being, however, expressly understood and agreed that no risk would be taken under it unless The Ocean Company "take or have an amount on same risk equal to one-half the amount covered by" The Sun Company. On the 9th of February, 1864, it was agreed in writing, noted upon the policy, that the policy should "cover such other risks as this (The Sun) company may approve and indorse" thereon. Under this new arrangement the clause limiting the risks to such as The Ocean Company retained an interest in to the extent named, to wit, an amount equal to one-half that of The Sun, was kept in force; but, Feb. 24, 1864, the president of The Sun Company wrote to The Ocean Company as follows: "We are willing that you be not obliged to retain a half of risk when you do not wish to do so, but we reserve the right to object to amounts returned, which it is not probable will be too great very often."

The policy issued is as follows: —

"No. 51,564.] By The Sun Mutual Insurance Company. [Cargo.

"The Ocean Insurance Company, on account of whom it may concern, loss payable to them, do make insurance and cause to be insured, lost or not lost, at and from Cuba to Boston or Portland, on property.

"This company not to be liable for more than fifteen thousand dollars by any one vessel at one time, unless otherwise agreed upon at the time of indorsement.

"It is understood and agreed that this company does not take any risk unless The Ocean Insurance Company take or have an amount on same risk equal to one-half the amount covered by this company upon all kinds of lawful goods and merchandise, laden or to be laden on board the good vessel or vessels , whereof is master for this present voyage, , or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel, or the master thereof, is or shall be named or called

. Beginning the adventure upon the said goods and merchandises from and immediately following the loading thereof on board of the said vessel at aforesaid, and so shall continue and endure until the said goods and merchandise shall be safely landed at aforesaid. And it shall and may be lawful for the said vessel in her voyage to proceed and sail to, touch, and stay at any ports or places if thereunto obliged by stress of weather, or other unavoidable accident, without prejudice to this insurance. The said goods and merchandise hereby insured are valued at
Touching the adventures and perils, which the said Sun Mutual Insurance Company is contented to bear and takes upon itself in this voyage, they are of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, or people, of what nation, condition, or quality soever, barratry of the masters and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, or any part thereof. And in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, factors, servants, and assigns to sue, labor, and travel for, in and about the defence, safeguard, and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance; to the charges whereof the said insurance company will contribute according to the rate and quantity of the sum herein insured, having been paid the consideration for this insurance by the assured or assigns at and after the rate of two per cent nominal , subject to such addition or deduction as shall make the premium conform to the established rate at the time the return is made to the company. Property on deck warranted free from claims for damage by wet, exposure, breakage, or leakage. And in case of loss, such loss to be paid within thirty days after proof of loss and proof of interest in the said (the amount of the note given for the premium, if unpaid, being first deducted), but no partial loss or particular average shall in any case be paid, unless amounting to five per cent: Provided always, and it is hereby further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in date to this policy, then the said Sun Mutual Insurance Company shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured, and the said Sun Mutual Insurance Company shall return the premium upon so much of the sum

by them assured as they shall be by such prior assurance exonerated from. And in case of any insurance upon the said premises subsequent in date to this policy, the said Sun Mutual Insurance Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received in the same manner as if no such subsequent assurance had been made. It is also agreed that the acts of the insured or insurers in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered a waiver or acceptance of an abandonment. It is also agreed that the property be warranted by the assured free from any charge, damage, or loss which may arise in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war.

"If laden on board a vessel of a belligerent nation, warranted free from loss or expense, arising from capture, seizure, or detention, or the consequences of any attempt thereat; or if by a neutral vessel, warranted not to abandon in case of capture, seizure, or detention, until after condemnation of the property insured, nor until ninety days after notice of said condemnation is given to the company; also, warranted not to abandon in case of blockade, and free from any expense in consequence of capture, seizure, detention, or blockade, but in the event of blockade to be at liberty to proceed to an open port, and there end the voyage; any stipulations in this policy to the contrary notwithstanding.

"In case of claims for damage on dry goods or hardware exceeding fifteen per cent, the company to have the privilege of settling upon the principle of a salvage loss, paying to the assured the sum insured, with the freight and the duties.

"In witness whereof, the president or vice-president of the said Sun Mutual Insurance Company hath hereunto subscribed his name and the sum insured, and caused the same to be attested by their secretary in New York, the sixteenth day of January, one thousand eight hundred and sixty-four.

MEMORANDUM. — It is agreed, that bar, bundle, rod, hoop and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wickerware and willow, manufactured or otherwise, salt, grain of all kinds, tobacco, Indian meal, fruits (whether preserved or otherwise), cheese, dry fish, vegetables and roots, rags, hempen yarn, bags, cotton bagging and other articles used for bags or bagging, pleasure carriages, household furniture, skins and hides, musical

instruments, looking-glasses and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, tobacco stems, matting and cassia, except in boxes, free from average under twenty per cent, unless general; and sugar, flax, flax-seed and bread are warranted by the assured free from average under seven per cent, unless general; and coffee in bags or bulk, pepper in bags or bulk, and rice free from average under ten per cent, unless general.

"Warranted by the assured free from damage or injury from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils. In case of partial loss by sea damage to dry goods, cutlery, or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged and not otherwise; and the same practice shall obtain as to all other merchandise as far as practicable.

"This company is not liable for leakage on molasses or other liquids, unless occasioned by stranding or collision with another vessel.

"If the voyage aforesaid shall have been begun and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination of the voyage.

"In all cases of return of premium in whole or in part, one-half per cent upon the sum insured is to be retained by the assurers.

"$100,000 (one hundred thousand dollars).

"S. WHITEHEAD, *Vice-President.*

"E. R. ANTHONY, *Secretary.*"

"1864. February 2. Additional $100,000 (one hundred thousand dollars), subject to same conditions as above.

"S. WHITEHEAD, *Vice-President.*

"E. R. ANTHONY, *Secretary.*"

Written on margin opposite additional subscription the following: —

"Warranted by the assured free from all claim for loss or damage arising from any warlike or belligerent act, or from capture, seizure, restraint, or detention by any privateer, cruiser, or armed vessel whatsoever."

3. This policy was issued with the expectation that it would be used by The Ocean Company for the purposes of reinsur-

ance, an arrangement for such a business on the part of the company having been made.

4. Dec. 24, 1863, Charles S. Pennell, as an owner and agent of the ship "C. S. Pennell," of 975 tons burthen, and then lying in the harbor of Portland, Maine, chartered the whole of the vessel, including the state-rooms in cabin not used by the officers, and deck-rooms not used for the crew or for sails and stores, to Sutton & Co., for a voyage from New York to San Francisco. No cargo was to be received on board except with the written consent of the charterers, and they were to pay "for the charter or freight" on the good and proper discharge of the cargo in San Francisco, $26,500, less two and one-half per cent commission. George M. Melcher was at the time master of the ship, and his primage on the freight money, if earned, would have been $1,325. This charter will be referred to as the San Francisco charter.

5. After the making of this charter the vessel sailed from Portland to New York, and was there put up and advertised by Sutton & Co. as a general ship for San Francisco. That firm at that time represented what was known as the Dispatch Line of San Francisco packets.

6. January 30, while the ship was in New York, loading under her San Francisco charter, and advertised for that voyage, her master chartered her again to the Peruvian government. By the terms of this charter she was to sail from New York on or before June 1, 1864, to San Francisco, and thence proceed, with all convenient dispatch, to Callao, Peru, and from thence, if on inspection she should be found to be well conditioned for the voyage, to the Chincha Islands for a cargo of guano to be taken to Hamburg or Rotterdam. The freight to be paid was at the rate of £4 per ton of 20 cwt. British net weight of guano, subject, however, to a deduction of five shillings per ton if the vessel was not ready in Callao to proceed to Chinchas by December 15. This charter will be referred to as the Rotterdam charter.

7. On the 5th of February, 1864, while the ship was in New York loading, Charles S. Pennell, a part owner, took from The Ocean Company a policy insuring his interest in the ship for $8,000 against war risks, and his interest in the Rotterdam

charter for $8,000 against marine risks on the voyage between New York and the Chinchas. In this policy the duration and locality of the risk was described as "at and from New York, to, at, and from San Francisco, Callao, and the Chinchas."

8. George M. Melcher was at the time owner of one-eighth of the ship, and master. On the 20th March he wrote one Sawyer, his agent at Portland, advising that the ship was about ready to sail, and directing that insurance be effected on his interest as follows: —

War risk to San Francisco, ship	$5,000
Charter to San Francisco, $26,500–⅛	3,300
Primage on same	1,325
Homeward charter from Chinchas, insure out, say 1,750 tons, at £4 to £7,000, at currency rate of exchange, $52,400, my ⅛	6,550
Primage on same	2,650
Chronometers, Dent, 1883; Negus, 1,261	500
And our effects, clothing, &c.	1,000
	$19,425

In the same letter it was said: "I think you had better put 5 or $6,000 more marine risk in case I should lose the ship."

9. Upon the receipt of this letter Sawyer applied to The Ocean Company for a policy upon the Rotterdam charter, primage, and personal effects to San Francisco. In doing so, he exhibited his letter of instructions and explained fully all the circumstances. The risk was accepted and the policy issued March 23, in which the risk was described as follows: "$6,550 on charter; $2,650 on primage; and also $1,500 on property on board ship 'Charles S. Pennell,' at and from New York to San Francisco."

10. On the same day The Ocean Company insured the master for $3,000 on his interest in the ship during the whole of her voyage, describing the duration and locality of the risk as "at and from New York to, at, and from San Francisco and Chinchas, with usual liberties at Callao, to her port of advice and discharge in Europe."

11. On the same 23d of March the president of The Ocean Company wrote the vice-president of The Sun as follows: —

". . . . I also enclose returns for registry as follows: . . . . $5,000, ship 'C. S. Pennell,' to San Francisco and Chinchas, war; $5,000 fr. of do. . . . . P. S. — I also enclose an additional return for insurance on charter, primage, and property per ship 'C. S. Pennell' to San Francisco only."

The returns enclosed in this letter were as follows: —

"To the Sun Mutual Insurance Company:

"Enter on open policy of this company No. 51,564, $5,000 on charter of ship 'Charles S. Pennell' at and from New York to, at, and from San Francisco and Callao to Chinchas.

"Rate, three per cent on board.

"New York, March 23d, 1864.

"J. W., *V. P. Ocean Ins. Co.*
"Per G. A. W., *Sec'y.*"

"To the Sun Mutual Insurance Company:

"Enter on open policy of this company No. 51,564, war risk only, $5,000 on ship 'Chas. S. Pennell,' at and from New York, to, at, and from San Francisco to Callao to Chinchas.

"Rate, three per cent on board.

"New York, March 23d, 1864.

"J. W., *V. P. Ocean Ins. Co.*
"Per G. A. W., *Sec'y.*"

"To the Sun Mutual Insurance Company:

"Enter on open policy of this company No. 51,564, $6,550 on charter, $2,650 on primage, and $1,500 on property, on board ship 'Chas. S. Pennell,' at and from New York to San Francisco, including war risk.

"Rate, six per cent on board.

"New York, March 23d, 1864.

"J. W., *V. P. Ocean Ins. Co.*
"Per G. A. W., *Sec'y.*"

The first and second of these returns were for reinsurance on the risks taken for Charles S. Pennell, and the last on account of the risks taken in favor of the master on the Rotterdam charter and personal property on board, from New York to San Francisco. The risk on the vessel, taken in favor of the master at the same time, was not reported to The Sun Company.

12. Upon the receipt of this letter, with its enclosures, the

president of The Sun Company wrote The Ocean Company, under date of March 24, as follows: —

"Your favor of the 23d inst. is received, . . . and returns as stated. Those . . . on charter per 'Chas. S. Pennell,' $10,700, in conformity thereto. For the marine risk per 'Chas. S. Pennell' to San Francisco, thence to Callao & Chinchas, our regular tariff rate is four and one-half per cent; the war risk is worth the same but we propose to enter for both marine and war on $5,000 for four per cent."

13. To this the president of The Ocean Company replied, under date March 26, as follows: —

"Your favor of the 24th inst. is received. I think, really, considering that you have the risk on charter, primage, and property to San Francisco at full rates, you should take the war and marine to San Francisco and Chinchas on 'C. S. Pennell' at six per cent, as there is or will be but little risk in the Pacific after leaving San Francisco. I can have both risks taken at less than these rates."

14. In response to this the vice-president of The Sun wrote, under date of March 28, as follows: —

"Your favor of the 26th inst. is received with a return, . . . which is entered in conformity thereto, as have also been the returns of the 23d inst., per ship 'C. S. Pennell.'"

15. The indorsement of these returns upon the open policy was as follows: —

1864.	Vessel.	From —	To —
March 23.	Ship Chas. S. Pennell	N. Y., San Francisco	Callao & Chincha
	Am'ts.	Rates.	Prems.
On charter . . .	$5,000	3	$150 marine
1864.			
March 23.	Ship Chas. S. Pennell	N. Y., San Francisco	Callao & Chinchas
	Am'ts.	Rate.	Preme.
On vessel	$5,000	3	$150 war only
" " " New York, San Francisco,		charter, 6,550; 6,393	war & marine
" " " " "		primage, 2,650; 6,150	"
" " " " "		property, 1,500; 6, 90	"

16. At the time these returns were made and accepted The Sun Company had actual knowledge of the San Francisco charter, and had taken risks on cargo shipped on board the vessel to San Francisco under it.

17. When the returns were made by The Ocean Company to The Sun for acceptance and indorsement, no special mention was made of the Rotterdam charter, and no information was given The Sun Company of what had transpired between The Ocean Company and the agent of the master when the insurance was effected. No allusion was made to the letter of the master to his agent, which was shown the president of The Ocean in connection with the application to that company, and The Sun Company had no other knowledge of the existence of the Rotterdam charter than such as is to be inferred from the correspondence which preceded the acceptance of the risk.

18. Both the president of The Ocean Company and the vice-president of The Sun Company are dead. The first-named died in July, 1869, and the last some time before Jan. 1, 1867.

19. The ship sailed from New York to San Francisco about the 1st of April, 1864, having on board a full cargo under the San Francisco charter. Having met with a disaster on the voyage, she put into Rio Janeiro, where she was condemned and sold, and the voyage broken up.

20. The loss under the risk taken in favor of Charles S. Pennell, both on the ship and Rotterdam charter, was paid by The Sun Company without objection, Oct. 23, 1865, and May 5, 1866.

21. In due time after the loss occurred, the master filed with The Ocean Company his proofs under his policy on account of the Rotterdam charter and his primage thereon. These proofs were promptly forwarded by The Ocean Company to The Sun, and no objections to their form were ever made. Payment was refused by The Sun Company on the ground that the master was over insured, and also upon the ground that the ship had been fraudulently cast away, and The Ocean Company was advised not to pay the claim on that account.

22. Pursuant to this advice, payment was refused by The Ocean Company, and, in October, 1866, Melcher, the master, commenced suit upon his policy in the courts of Maine.

23. Of the commencement of this suit notice was immediately given The Sun Company by The Ocean Company, and The Sun Company interested itself in the preparation for de-

fence. An agent of those interested, including another company having a risk upon the voyage, was sent to Rio Janeiro to ascertain the facts in relation to the loss, and report. In the mean time the suit upon the policy was suffered to remain in the court without being pressed. At the October Term, 1869, the counsel for the plaintiff insisting that something should be done, it was agreed, on behalf of The Ocean Company, that the case should, if possible, be tried at the January Term, 1870. In November, or late in October, 1869, the counsel on the part of The Ocean Company visited New York for the purpose of having a personal interview in respect to the case with the officers of The Sun Company. He there met the then vice-president of the company. At the interview which then took place, the points of defence that had been previously suggested by the companies having been discussed, the counsel stated that, in his opinion, they could not be sustained by the evidence, but that he intended to make the point that the Rotterdam charter was not included in the risk as described in the policy. He said, however, that he had been informed by the attorneys who conducted the case for the plaintiff they had extrinsic evidence which would establish the liability and which they expected to introduce. This extrinsic evidence he considered inadmissible, but at the same time said that if admitted, the defence to the action would undoubtedly fail. He then informed The Sun Company that upon the presentation of the evidence on the trial he should object to its admission, and he had no doubt the presiding judge, under the practice of that State, would take the advice of the Supreme Court upon that question before proceeding further. If the evidence was ruled out, he expected to succeed in his defence; but if admitted, he had little hopes. He did not at that time know precisely what the testimony would be, and he did not communicate to the company the particular facts relied upon.

24. At the conclusion of the interview he was instructed by the vice-president of The Sun Company to go forward with the defence, and make every point possible. He was paid at the time one hundred dollars, for which he gave a receipt as follows: —

"NEW YORK, Nov. 2d, 1869.

"Received from The Sun Mutual Insurance Company one hundred dollars, on account of legal expenses and services for defending The Ocean Insurance Company of Portland from claims for loss on charter and primage in case of the ship 'C. S. Pennell,' reinsured by The Sun Mutual Insurance Company for The Ocean Insurance Company.

"JOHN RAND."

25. At the April Term, 1870, the cause came on for trial, and the questions were raised upon the admissibility of the extrinsic evidence, and reported to the Supreme Court for its opinion. The testimony objected to included the deposition of Sawyer, the agent of the insured, as to what transpired between him and The Ocean Company at the time the insurance was effected; the letter from the insured to Sawyer specifying the risk to be taken, and which was submitted to the company by the agent, as showing the authority under which he acted, and also the Rotterdam charter.

26. On the 6th of October, 1870, the attorney of The Ocean Company sent The Sun Company a copy of the case thus made, which contained a statement of the evidence offered and objected to.

In the letter transmitting this document, the attorney said: —

"The question now presented to our court is simply whether he (the insured) shall be allowed to put in the testimony. If not allowed, there is an end of the case. If allowed, then we go to trial upon other points of defence."

26½. In reply to this the president of The Sun Company wrote as follows: —

"NEW YORK, Oct. 15, 1870.

"Messrs. J. & E. M. RAND, Portland, Me.

"GENTS, — Yours of 6th instant was duly received, also the printed documents which you sent, and which we have perused carefully.

"It is shown by the testimony that the policy was made in accordance with the application of the plaintiff, and that there was no misunderstanding in relation thereto calling for the admission of

evidence outside of the policy to explain it; certainly none would be admissible to contradict it, for that would be setting up a new contract other than the policy itself which is sued upon.

"It is important, therefore, to have excluded all evidence tending to contradict the policy. By the policy, as made, the plaintiff insured on charter New York to San Francisco, $6,550; on primage, $2,650; on personal effects, $1,500. There is no such charter shown; but the plaintiff sets up a charter to San Francisco and ports beyond, as described in the charter-party. The insurance of the charter to San Francisco was an insurance of only a part of said charter, not amounting even to a part insurance of the charter, because as the charter-party is to the effect that no money is to be paid by the charterers unless the whole round voyage is performed, and the contract being indivisible if no money was to be paid for the passage to San Francisco, the plaintiff had no insurable interest in that part of the charter; besides, the ship was loaded to her full capacity, and was carrying full freight on said passage outside of the charter, which was covered under special policies. The plaintiff has, therefore, by the perils insured against in the policy, suffered no loss beyond what he has already been indemnified for under his policy on freight. The interest of the plaintiff in the passage to San Francisco was, therefore, an impossible interest. I do not mean to say that he had no interest in the charter-party, but the risk under our policy being only to San Francisco, ended before the charter-party could by any possibility be performed. I think, therefore, that the main question is the question of interest, and think that the above reasons will be found sound in law. Please let me hear from you as to your opinion of them, and also as to your line of defence, — what your points are, — in order that I may be able to form some opinion as to the ultimate issue of the suit.

"Yours respectfully,

"(Signed) J. P. PAULISON, *President.*"

27. In or about January, 1872, the Supreme Court decided that the testimony was admissible, and on the 16th of that month the attorneys advised The Sun Company of the result, and sent a copy of the opinion delivered. They also said that the case would probably come up again for hearing in a week or two, and asked that papers of any kind relating to the defence in the possession of The Sun Company might be forwarded to them at once.

28. Upon the receipt of this last letter the case was submitted by The Sun Company to its counsel in New York, who gave his opinion in writing to the effect "that The Sun Mutual Insurance Company's liability under the reinsurance policy cannot be extended beyond the obvious import of the terms in which it is expressed. The letter of Melcher ordering the insurance not having been exhibited to them, nor the explanations of Sawyer made to them, they cannot be affected by them; and hence, if the admission of extrinsic evidence as to what took place between Sawyer and The Ocean Company, when the original insurance was made, varies the case as between that company and Melcher from what it appears to be on the face of the original policy, I cannot see that it is a matter that concerns The Sun Company."

29. January 29 a copy of this opinion was forwarded by The Sun Company to the attorneys in Portland, and attention called to its contents.

30. At the January Term, 1872, the cause was again tried, and the testimony being all in, the case was withdrawn from the jury and submitted to the court to enter such judgment as law and the evidence required. The point was directly made by The Ocean Company that the policy never attached, because the ship never actually or legally sailed under the Rotterdam charter.

31. On the 12th of July, 1872, the case having been printed, a copy was sent by the attorneys in Portland to The Sun Company, with a statement that the cause would come on for argument before the full bench in a few days. Permission was also asked to draw on the company at sight for $500 on account of fees and disbursements.

31½. On the 5th of July The Sun Company replied, denying its liability to pay fees, and saying that, "as the suit is against The Ocean Company and not against us, you must look to them for your fees." It is also said in the letter that when the payment of $100 was made, in November, 1869, the case as subsequently developed was not fully understood.

32. A judgment was afterwards rendered in the suit against The Ocean Company for $9,200, and interest from April 27, 1865.

33. This judgment was satisfied by payments of The Ocean Company as follows: —

July 19, 1873	$4,234 29
July 21, 1873	10,086 55

34. The costs in the action which were included in the payment were $574.17.

35. The account of the counsel in the cause for their professional services and disbursements, over and above the $100 paid by The Sun Company, was $1,164.70. This was also paid by The Ocean Company, July 23, 1873, and was reasonable.

36. Payment of the amount of the judgment and the account for counsel fees was duly demanded of The Sun Company before the commencement of this suit, and refused.

The following is the statement by the Circuit Court of its conclusions of law: —

1. The Sun Company's policy covers the Rotterdam charter.

2. The policy is not void because of any concealment by The Ocean Company.

3. The judgment in the Maine court against The Ocean Company is conclusive upon the issues there made and decided, and binds The Sun.

4. This action is not barred either by the Statute of Limitations or by lapse of time.

5. The Sun Company is bound in law to reimburse The Ocean for moneys expended on account of counsel fees, and the costs and expenses in defending the suit in the Maine court.

6. The libellant is entitled to a decree against the defendant for —

1. Amount paid in satisfaction of the Maine judgment .	$14,320 84
2. Amount paid for counsel fees, expenses, &c. . . .	1,164 70
In all	$15,485 54

With interest from July 21, 1873, and the costs in both courts.

Mr. William M. Evarts and *Mr. Joseph H. Choate* for the appellant.

Mr. E. N. Taft and *Mr. Robert D. Benedict* for the appellee.

MR. JUSTICE MATTHEWS delivered the opinion of the court, and, after making the above statement, proceeded as follows: —

By the express terms of the act of Congress of Feb. 16, 1875, c. 77, defining the jurisdiction of this court, in cases such as the present, we are limited to a determination of the questions of law arising upon the record, including the rulings of the Circuit Court, presented in a bill of exceptions. And, as was decided in *The Abbotsford*, 98 U. S. 440, and substantially repeated several times since, "the facts as found and stated by the court below are conclusive. The case stands here precisely as though they had been found by the verdict of a jury." *The Benefactor*, 102 id. 214; *The Adriatic*, 103 id. 730; *The Annie Lindsley*, 104 id. 185; *The Francis Wright*, 105 id. 381. Or as it was put in *The Annie Lindsley*, 104 id. 185, 188: "The question, and the only question, which we can consider is, whether the facts found support the conclusions of law and the decree." The findings of fact being in the nature of a special verdict, we can go neither behind nor beyond them. We cannot correct them by inquiring into the evidence, nor supply any omissions by intendment or inference. The rule applicable to special verdicts was stated in *Collins* v. *Riley*, 104 id. 322, 327, — "that the special verdict must contain all the facts from which the law is to arise; that whatever is not found therein is, for the purposes of a decision, to be considered as not existing; that it must present, in substance, the whole matter upon which the court is asked to determine the legal rights of the parties, and cannot, therefore, be aided by intendment or by extrinsic facts, although such facts may appear elsewhere in the record," — which needs qualification in its application to such cases as the present; for our jurisdiction, in cases of this description, extending to a determination of the questions of law arising upon the record, may be predicated of facts which appear in any part of it, whether admitted by the

parties in the pleadings, or by stipulation, or found by the court. But it is essential that the findings of fact should state the facts, and not the evidence merely, even although the evidence be sufficient to establish the fact. Mr. Chief Justice Marshall stated this rule in *Barnes* v. *Williams*, 11 Wheat. 415, when he said: "Although, in the opinion of the court, there was sufficient evidence in the special verdict from which the jury might have found the fact, yet they have not found it, and the court could not, upon a special verdict, intend it. The special verdict was defective in stating the evidence of the fact, instead of the fact itself. It was impossible, therefore, that a judgment could be pronounced for the plaintiff." This was approved in *Hodges* v. *Easton*, 106 U. S. 408. And see *Prentice* v. *Zane's Adm'r*, 8 How. 470, and *Norris* v. *Jackson*, 9 Wall. 125.

These observations have a material and important application in this case.

It was essential to the establishment of the libellant's right of recovery to show that the risk insured against by the policy sued on was the same which the libellant was adjudged liable for on its policy to Melcher. The policy of the respondent in this suit, although, in substance, a reinsurance, was not so in form. It did not describe the risk by reference to the policy of The Ocean Company, so that the identity between the two could be ascertained by mere comparison. It did not, in fact, allude to any such policy. The risk is described, solely, by words descriptive of the property insured, without a definition of the interest of the assured. It became necessary, therefore, to aver the identity of the two insurances. This the libel does. But, as it is denied in the answer, it became necessary to prove it. The finding of facts, however, in the Circuit Court does not assert it. It contains other facts bearing on the question. But the conclusion itself is stated, not as a fact, but as a conclusion of law, from the facts found, — the facts and the conclusions of law having been separately stated, as expressly required by the act of Congress. The first conclusion of law, in the statement made by the Circuit Court, is that "The Sun Company's policy covers the Rotterdam charter."

The question, therefore, presented to us on this appeal is,

not whether that might be true as a conclusion of fact from the circumstances stated in the findings of fact, but whether, upon the facts found, it must be true as matter of law.

The distinction is obvious and important. The circumstances in evidence might be such, that a jury, or a court sitting to try the case without a jury, would believe, as the more reasonable probability, according to the ordinary and observed course of human conduct, that the fact disputed had or had not actually taken place; and in that case the inference would be one of fact. On the other hand, the facts found might be such as to be, in point of law, inconsistent with any supposition, except that of the existence or non-existence of the fact in controversy, in which case the conclusion is necessary, independently of any belief based upon what is more or less probable, because the law declares the uniform effect of such a state and condition of circumstances. The difference is between presumptions of fact and rebuttable presumptions of law, or *presumptiones juris tantum*, as distinguished from *presumptiones juris et de jure*, according to the classification of Best, Law of Evidence, sect. 314, 4th English ed., who states the practical test for distinguishing them thus: "Where a presumption of law is disregarded by a jury, a new trial will be granted *ex debito justitiæ;* but where the presumption disregarded is only one of fact, however strong or obvious, the granting a new trial is at the discretion of the court *in banc.*" Sect. 323.

In other words, when the testimony has been sifted and weighed, and the actual circumstances of the transaction stated in a connected form, the law, by means of its presumptions, determines whether they establish such a relation between the parties as to give rise to reciprocal rights and obligations, and if so, what legal consequences have followed. The issue to be determined may be one, in form, merely of fact, as whether a particular contract was made, or whether one or both of the parties have been guilty of negligence. The circumstances of the entire transaction having been ascertained and stated, the issue is determined by the interpretation which the law puts upon them. This is an office quite distinct from ascertaining the circumstances themselves by the process of reduction from

the original mass of evidence. It involves only a consideration of the facts as found, in their relation to each other, in view of fixed legal presumptions, in order to determine and declare the effect to be given to them as a connected whole.

This rule was, after much consideration, established in *United States* v. *Pugh*, 99 U. S. 265, in reference to the examination of the judgments of the Court of Claims, and we reiterate it here, as equally applicable to appeals from the decrees in admiralty of the Circuit Courts of the United States under the act of 1875. In that case, one of the issues to be determined was, whether the proceeds of the sale of the captured property belonging to the claimant had been paid into the treasury. No direct proof to that effect had been given, but if shown at all, it was by way of inference from certain circumstantial facts established by the evidence, and set forth in the finding of the court below. The Chief Justice said, upon this point: "Confessedly, the court has found all the facts which have been directly established by the evidence. These facts are not evidence in the sense that evidence means the statements of witnesses or documents produced in court for inspection. They are the results of evidence, and whether they establish the ultimate fact to be reached is, if a question of fact at all, to say the least, in the nature of a question of law. If what has been found is, in the absence of anything to the contrary, the legal equivalent of a direct finding that the proceeds of this claimant's property have been paid into the treasury, the judgment is right; otherwise, it is wrong. The inquiry thus presented is as to the legal effect of facts proved, not of the evidence given to make the proof," &c. . . . "The rule relieves us from the necessity of considering the evidence at all, and confines our attention to the legal effect upon the rights of the parties of the facts proven as they have been sent up from the court below. In this way the weight of the evidence is left for the sole consideration of the court below, but the ultimate effect of the facts, which the direct evidence has established, is left open for review here on appeal."

Tried according to this standard, we are quite clear that the conclusion under examination cannot be sustained.

The facts material to the point, and which, in our opinion, justify and require this result, are as follows: —

The language of the policy sued on, descriptive of the risk assumed, is, "$6,550 on charter, $2,650 on primage, and $1,500 on property on board ship 'C. S. Pennell,' at and from New York to San Francisco." The proposal for this insurance was made March 23, 1864, by letter. The vessel, at that time lying at New York, had been previously chartered to her full capacity for a voyage from New York to San Francisco, of which both companies had knowledge; and on Jan. 30, 1864, was chartered by Melcher, her master, to the Peruvian government, by the terms of which charter she was to sail from New York on or before June 1, 1864, to San Francisco, and thence proceed, with all convenient dispatch, to Callao, Peru, and from thence, if on inspection she should be found well conditioned for the voyage, to the Chincha Islands for a cargo of guano to be taken to Hamburg or Rotterdam. Of this second charter The Ocean Company had full knowledge, having, on Feb. 5, 1864, insured to Pennell, a part owner, his interest in both the ship and this charter on the voyage described as "at and from New York to, at, and from San Francisco, Callao, and the Chinchas." And on March 20, 1864, Melcher, one-eighth owner and master, by letter to his agent, Sawyer, directed the latter to insure his interest in the ship and both charters, specifically describing them, and primage and personal effects on board. Sawyer, exhibiting this letter to The Ocean Company and explaining fully the circumstances, that company issued one policy to Melcher, describing the risk in the same words as those used in the policy sued; and by a separate policy insured $3,000 on his interest in the ship during the whole voyage, described as "at and from New York to, at, and from San Francisco and Chinchas, with usual liberties at Callao, to her port of advice and discharge in Europe."

The letter of March 23, 1864, from The Ocean Company to The Sun Company, containing the return of the insurance involved in this suit, included two others, both of which were accepted, one of $5,000 "on charter of ship 'Charles S. Pennell' at and from New York to, at, and from San Francisco and Callao to Chinchas;" the other, a war risk only of $5,000

on the ship, on voyage described in the same words. The correspondence between the companies on the subject, at the time these risks were assumed, undoubtedly contains a reference to a voyage from New York to San Francisco, and thence to Callao and Chinchas, and of two insurances on charter, in one of which the voyage is described as including New York and Chinchas *via* San Francisco and Callao, and in the other, from New York to San Francisco; but there is nothing which indicates with any conclusive force that there were two distinct charters, and certainly nothing to indicate that there was one which included the return voyage from the Chinchas to Rotterdam. And in respect to the latter, it is found, as a fact, that "The Sun Company had no other knowledge of the existence of the Rotterdam charter than such as is to be inferred from the correspondence," which, as we have just stated, and as must appear from the full text of the letters set out in the findings, communicated no knowledge of such a charter whatever.

It will not suffice to say, as was said in argument, that the language of the correspondence and of the three contemporaneous insurances was such as to give The Sun Company notice of a voyage and charter beyond San Francisco, as well as of one to that port from New York, and that they must include distinct interests, so that, upon inquiry, it might have become informed of all the particulars of the Rotterdam charters. For the question is not one of notice sufficient to suggest further inquiry, and of due diligence in prosecuting it, disregard of which may be alleged as laches, but whether the minds of the parties in fact met in a common understanding, so as to consummate the contract sued on. And to show that, it was necessary to prove, in the absence of express words, and to resolve the ambiguity arising upon the evidence, that, from the circumstances, in point of fact, The Sun Company must have intended to insure an interest in the Rotterdam charter. Proof of its actual knowledge that such a charter was in existence would be only one step in that direction, and even that is wanting. Had it been supplied, the burden of proof would have still remained with the libellant to show that it was meant by both parties to describe that particular risk,

under an insurance upon a charter during a voyage described as at and from New York to San Francisco.

It is admitted that the language of the policy does not of itself import an insurance of a charter beyond one during the voyage described. *Prima facie*, indeed, it describes a charter terminating with that voyage, and not beyond. In the action brought by Melcher against The Ocean Company in Maine, and determined in the Supreme Court of that State, it was claimed by the defendant that the language of the policy conclusively described a charter-party limited to the description of the voyage, and that proof was not admissible to show that any other existed and was the one meant. And it was held in that case, in substance, that without such proof there could be no recovery; but that, inasmuch as a description of the voyage during which the risk was insured did not necessarily determine the extent of the charter-party under which the freight was to be earned, it appearing from extrinsic evidence that two charter-parties existed to which the insurance might apply, a latent ambiguity was disclosed which was susceptible of explanation by parol evidence. And accordingly, upon proof of the communications between Melcher and The Ocean Company, not made known at any time to The Sun Company, the former was adjudged to have insured by its policy his interest in the Rotterdam charter. Without that proof he must have failed in his litigation. It cannot be claimed that such proof is admissible to explain the contract of the appellant.

Nor is the liability of the latter affected by the fact that its policy is one of reinsurance in fact; nor by the circumstance that it aided in the maintenance of the defence in the suit against The Ocean Company; nor by the result and judgment in that action.

The policy, although a reinsurance, is a contract, which, like others, must be construed according to its terms, and the same ambiguity arises in respect to it that was found to exist in respect to the original insurance. The Sun Company, in maintaining the defence in aid of The Ocean Company, that the policy of the latter did not cover an insurance of Melcher's interest in the Rotterdam charter, maintained also, what it has continued to do in this suit, its own defence against the

changed claim of The Ocean Company which the latter now asserts, with the advantage that its defence cannot be overcome by proof of explanations outside of the policy itself, such as defeated the libellant in its contest with Melcher. And the judgment rendered in favor of the latter, upon the point in question, as to what was in fact the contract made with him by The Ocean Company, is no adjudication against the appellant, as to what is the contract between the parties to this suit; for it is only upon the pre-supposition of the identity of the subject-matter of the two contracts that it could be pretended that the judgment against The Ocean Company would be admissible in evidence, for any purpose material here, against The Sun Company. To admit it as evidence of that identity is a pure *petitio principii*. Accordingly, it was an additional and substantive error in the Circuit Court to find, as a conclusion of law, as it did, that "the judgment in the Maine court against The Ocean Company is conclusive upon the issues there made, and decided and binds The Sun." It was, of course, conclusive upon The Ocean Company, but was not even admissible in evidence against The Sun Company, without prior proof that the policy of the latter company was intended to cover the Rotterdam charter.

Much reliance is placed, in argument in support of this contention on the part of the libellant, upon the circumstance, stated in the findings of fact, that "the loss under the risk taken in favor of Charles S. Pennell, both on the ship and Rotterdam charter, was paid by the Sun Company, without objection, October 23, 1865, and May 5, 1866." These losses were paid on the two insurances effected contemporaneously with that sued on in this proceeding, in which the voyage described was, "at and from New York to, at, and from San Francisco and (to) Callao to Chinchas." But, at most, this only gives rise to an inference that these two insurances were intended to cover some charter, other than the one from New York to San Francisco, and, indeed, is not conclusive as to that. It certainly does not establish, even in respect to them, that they were understood, at the time the insurances were effected, to cover a risk upon an interest in the Rotterdam charter, or any charter in force during the voyage from New

York to San Francisco; much less, can it be said, that any admission can be implied, from such payment, that the risk, described as upon ship and charter during the extended voyage to Callao and the Chinchas, although described as commencing at New York, was identical, so far as the charter was concerned, with that in the policy sued on, in which the voyage is described as from New York to San Francisco. In any aspect, the circumstance relied on is merely argumentative. The Sun Company may have made the payment inadvertently, without consideration of its strict rights. It certainly is not conclusive as an admission of liability in this case, for it has no element of estoppel, and to justify the conclusion of law sought to be drawn from it would be to give it that effect.

The fact that The Sun Company participated in the defence of The Ocean Company in the action brought by Melcher, and the communications between the companies in respect to it, so far as they are set out in the findings of fact, are, in our opinion, equally without effect, and do not amount either to an admission of liability or to an agreement to be bound by the result of that litigation; and having carefully considered all the circumstances found and relied on, without further special mention of them, we are constrained to say that they do not, either singly or together, sustain the conclusion that "The Sun Company's policy covers the Rotterdam charter."

This conclusion is, in our opinion, greatly strengthened by the consideration of other facts set out in the finding, which, while they tend to show that as a matter of fact The Sun Company did not intend to reinsure Melcher's interest in the Rotterdam charter, furnish also a distinct ground of defence, as matter of law, if the fact had been otherwise, and negative the second conclusion of law announced by the Circuit Court, that "the policy is not void because of any concealment by The Ocean Company."

The situation was this: There were two concurrent charters on the ship, both which were treated as in force during the one voyage from New York to San Francisco, in the course of which she was lost. The first charter covered a full cargo, and no additional freight could be simultaneously earned under the second, for no part of the cargo contemplated by it could

be on board till after the voyage under the first charter had been completed. In case of loss during that voyage, consequently, there could be no salvage of freight applicable to the second charter. Melcher was master and owner of one-eighth of the ship. On March 20, 1864, he instructed his agent, Sawyer, by letter shown to The Ocean Company, to effect insurance on his behalf against war risk on ship, and generally on his interest in both charters specifically, besides primage, and on his personal effects, amounting in all to $19,425, and in the same letter said: "I think you had better put $5,000 or $6,000 more marine risk in case I should lose the ship." The Ocean Company accepted the risk on the Rotterdam charter, primage, and personal effects to San Francisco, and on the same day insured the master for $3,000 on his interest in the ship during the whole of her voyage, describing the duration and locality of the risk as "at and from New York to, at, and from San Francisco and Chinchas, with usual liberties at Callao, to her port of advice and discharge in Europe." This latter insurance was not made known to The Sun Company, nor was it informed of any of the communications that had taken place between The Ocean Company and Melcher, including the contents of the letter to Sawyer.

It thus appears that at the time of the loss Melcher had insurance on two concurrent charters and his primage thereon during one voyage, being insured, besides his interest in the ship, on double the amount of its possible earnings of freight for one voyage. This fact was known to The Ocean Company at the time, and was not communicated by it to The Sun Company, which was without other knowledge upon the subject, and executed its policy to The Ocean Company in ignorance of it.

That knowledge of the circumstance was material and important to the underwriter as likely to influence his judgment in accepting the risk, we think, is so manifest to common reason as to need no proof of usage or opinion among those engaged in the business. It was a flagrant case of over-insurance upon its face, and made it the pecuniary interest of the master in charge of the ship to forego and neglect the duty which he owed to all interested in her safety. Had it been known, it is

reasonable to believe that a prudent underwriter would not have accepted the proposal as made, and, where the fact of the contract is in dispute, as here, corroborates the denial of the appellants. The concealment, whether intentional or inadvertent, we have no hesitation in saying, avoids the policy, if actually intended to cover the risk for which the claim is made.

In respect to the duty of disclosing all material facts, the case of reinsurance does not differ from that of an original insurance. The obligation in both cases is one *uberrimæ fidei*. The duty of communication, indeed, is independent of the intention, and is violated by the fact of concealment even where there is no design to deceive. The exaction of information in some instances may be greater in a case of reinsurance than as between the parties to an original insurance. In the former, the party seeking to shift the risk he has taken is bound to communicate his knowledge of the character of the original insured, where such information would be likely to influence the judgment of an underwriter; while in the latter the party, in the language of Bronson, J., in the case of the *New York Bowery Fire Ins. Co.* v. *New York Fire Ins. Co.*, 17 Wend. (N. Y.) 359, 367, is "not bound nor could it be expected, that he should speak evil of himself."

Mr. Duer (Lect. 18, pt. 1, sect. 13; 2 Ins. 398) states as a part of the rule the following proposition: —

"SECT. 13. The assured will not be allowed to protect himself against the charge of an undue concealment by evidence that he had disclosed to the underwriters, in *general* terms, the information that he possessed. Where his own information is specific, it must be communicated in the terms in which it was received. General terms may include the truth, but may fail to convey it with its proper force and in all its extent. Nor will the assured be permitted to urge, as an excuse for his omission to communicate material facts, that they were actually known to the underwriters, unless it appears that their knowledge was as particular and full as his own information. It is the duty of the assured to place the underwriter in the same situation as himself; to give to him the same means and opportunity of judging of the value of the risks; and when any circumstance is withheld, however slight and immaterial

it may have seemed to himself, that, if disclosed, would probably have influenced the terms of the insurance, the concealment vitiates the policy."

This statement is sustained by the authorities cited, — *Ely* v. *Hallett*, 2 Caines (N. Y.), 57 ; *Moses* v. *Delaware Ins. Co.*, 1 Wash. 385, — and, in our opinion, is a necessary deduction from the nature and spirit of the contract of insurance. It applies with peculiar force in the present case, as every sentence of the rule is a condemnation of The Ocean Insurance Company in imposing upon the appellant the whole risk of the insurance, without communicating its knowledge of the circumstances, which might have made the latter as unwilling to assume it as they seem to have made the former unwilling to retain even a share of it.

For these reasons, and without passing upon other questions discussed, the decree of the Circuit Court will be reversed, and the cause remanded with directions to enter a decree dismissing the libel ; and it is

So ordered.

MR. JUSTICE MILLER, with whom concurred MR. CHIEF JUSTICE WAITE and MR. JUSTICE BRADLEY, dissenting.

I do not concur in the opinion of the court. It proceeds, as I think, upon an erroneous view of the principles of reinsurance, and places the reinsurer in the exact condition of a joint insurer, or of an original insurer of the risk of the party first insured.

In point of fact, The Sun Company insured The Ocean Company against the risk which the latter had incurred by its policies, and unless there was misrepresentation, fraud, or intentional concealment by The Ocean Company, The Sun Company should pay the loss which the other sustained, and against the hazard of which it agreed to insure The Ocean Company.

The long course of dealing between the two companies showed that The Sun Company was in the habit of reinsuring for The Ocean Company without inquiry into the particulars of the risk, and in this case there was no reason for any special communication of the circumstances of the risk by The Ocean to The Sun Company.

THE "ADRIATIC."

1. Under the act of Feb. 16, 1875, c. 77, a finding in a case of admiralty and maritime jurisdiction on the instance side of the Circuit Court has the effect of a special verdict in an action at law, and although no exceptions are filed, its sufficiency in connection with the pleadings to support the decree rendered is open to consideration on appeal.
2. A sailing-vessel meeting a steamer should keep her course, unless it is manifest that she would thereby occasion a collision. Where, therefore, as in this case by her unnecessary changes of course, she misled and embarrassed an approaching steamer that was laboring to keep out of her way, and a collision occurred whereby she was sunk, whereas had she kept on the course she was sailing when first seen by the steamer, or adhered to her first new course afterwards taken, a collision would not have happened, — *Held*, that the steamer is not liable.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The facts are stated in the opinion of the court.

Mr. William Allen Butler and *Mr. Thomas E. Stillman* for the appellant.

Mr. Everett P. Wheeler and *Mr. Joseph H. Choate, contra.*

MR. JUSTICE FIELD delivered the opinion of the court.

This case comes before us on appeal from a decree of the Circuit Court, with a finding of facts upon which it was rendered. We are, therefore, relieved of much of the embarrassment experienced on the trial, both by that court and the District Court, from the difficulty of determining from the evidence the exact position of the vessels immediately preceding the collision. Here we must take the facts as found and apply the law to them. In cases of admiralty and maritime jurisdiction, on the instance side of the court, under the act of Congress of Feb. 16, 1875, c. 77, the finding has the effect of a special verdict in an action at law.

There is, it is true, a bill of exceptions in the record, but it contains exceptions only to the finding, and to the refusal of the court to find otherwise. It presents no question for our consideration except such as arises upon the facts as found. There is no occasion in any case to except specially to a finding, as its sufficiency, in connection with the pleadings, to support the decree rendered, is always open to consideration on appeal.

On the evening of Dec. 30, 1875, the ship "Harvest Queen," an American vessel, sailed from the harbor of Queenstown, Ireland, for the port of Liverpool, England. She was 187 feet long, of 1,626 tons burden, and had at the time a cargo of grain on board. On the same day the steamer "Adriatic," a British vessel, left Liverpool for New York, and proceeded down the Irish Channel. She was 450 feet long, and of over 3,000 tons burden. Her forward deck was roofed with what is termed a turtle-back, so called from its shape. The spray of the sea dashed over this roof, and her lookouts were, therefore, stationed on a house just abaft of it.

The wheel-house was on deck, and above and a little forward of it was the bridge, on which the officer on watch usually took his position. Adjoining the wheel-house, and opening into it, was the chart-room. At a quarter past two on the morning of December 31, the captain, who had been on duty all the time after leaving Liverpool, went into that room and lay down on a sofa, giving orders to be called at four, or sooner if any vessels came in sight. The first officer was then on watch, standing on the bridge, most of the time on the starboard side. Three seamen were on the lookout, one on each side of the house mentioned, and one on the port side of the bridge. At thirty-five minutes past two the first officer, looking through a night-glass, saw a green light about two points on his starboard bow. It could not be seen by the naked eye. It proved afterwards to be a light on the "Harvest Queen." At this time the sky was clear, with scattering clouds, but on the water the night was dark; the wind was blowing a fresh breeze from the southwest, and the sea was running high. The steamer was going about twelve knots an hour, having all her lights in their proper places and burning brightly. Soon afterwards the light on the "Harvest Queen" was seen by one of the lookouts, and two strokes were given to the bell on the turtle-deck as a signal that a light was seen on the starboard bow.

Four minutes after that — at thirty-nine minutes past two — the green light of the ship, which had broadened to three and a half points, changed to red. Up to this time the steamer had not altered her course. The character of the approaching

vessel was not known, nothing but her light being seen. But whether she was propelled by wind or steam, the steamer pursued the proper course to prevent the danger of collision. Her green light must have been equally visible from the "Harvest Queen;" and when two vessels keep the same colored lights in view of each other, collision is impossible, for they are then moving on parallel lines. The lights on vessels are required to be so placed as not to be seen across their bows. The red light coming in sight indicated that the ship had changed her course, and was no longer running on a parallel line, but in a direction which, if continued, would bring her across the bow of the steamer. The first officer, therefore, at once gave an order to port the helm, and signalled the engineer to stand by the engine, following this with a further order to slow the engine. Both these orders were promptly obeyed, and the steamer slowly swung to the right.

As already stated, the steamer was going at the rate of twelve knots an hour. The "Harvest Queen" — judging from the time she occupied in passing over the distance from Queenstown — must have been sailing at the rate of eight knots an hour; that is, the two vessels were approaching each other at a speed equal to about twenty miles an hour. The light on the "Harvest Queen" could not have been seen that night further than two miles and a half; and over this distance the steamer with her speed had passed four-fifths of a mile, and the "Harvest Queen" a little more than one-half of a mile. So that at this time, when the red light was seen, the vessels must have been about a mile and a quarter apart. At the rate they were moving they would come together or pass each other in four minutes. The first officer of the steamer at once perceived the necessity of an immediate change in her course so as to bring her on a parallel line with the approaching ship. To accomplish this it was necessary to port the helm of the steamer, which was at once done. The order to do this was, under the circumstances, the proper one to be given. The slowing of the speed of the steamer by reason of the proximity of the other vessel was also a proper proceeding. When a steamer is nearing another vessel, and there is danger of collision from continuing the rate of speed at which she is going, it is the duty of her captain to

slacken her speed, and, if necessary, to reverse her engines and move her backwards. Such is the express language of Rule 21 adopted by Congress for the prevention of collisions on the water, which is as follows: "Every steam vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam vessel shall, when in a fog, go at a moderate speed." Rev. Stat., sect. 4233.

Had there been no other change in the course of the "Harvest Queen," the new direction taken by the steamer would have carried her past that vessel without collision. But about a minute afterwards, or forty minutes past two, the red light of the "Harvest Queen" changed again to green. The steamer had then yielded to her helm and gone off a point to the starboard, and was swinging further in that direction. The first officer, seeing the reappearance of the green light, at once gave an order to stop the engine, and, as soon as it could be done, to back the steamer at full speed. This order was obeyed, and the engine was put in a reverse motion at about forty-one minutes past two.

The captain was then called, and immediately came on deck. Looking ahead he saw a green light not far away about two points off the starboard bow; then green and red lights appeared together, and then the red alone. He noticed also that the helm was to the port side and that the engine was under reversed action. Thereupon he gave the order from the deck, "Hard-a-starboard," which was obeyed. He then went on the bridge.

Had the steamer been then going astern, there could be no question as to the propriety of this order; it would have turned her to the right, and she would have passed on the left side of the "Harvest Queen," showing red light to red light, the two vessels in that event moving on parallel lines. The effect of a starboard helm, when a vessel is going astern, is directly the opposite of that produced when she is going ahead. But at the time the order was given, the forward motion of the steamer had not been entirely overcome, and she was still moving ahead slowly. It appears, however, that whilst thus moving with the reversed action of her engine the steamer did not yield to her

helm so as to materially change her forward direction. The order could not, therefore, have contributed to the collision. But were it otherwise, we cannot say that the captain could be justly blamed. In considering his action, the question is not whether the order given was the best when viewed in the light of subsequent events, but whether under the circumstances in which he was placed it was that of a prudent and skilful commander. The nearness of the approaching ship and the frequent change in her lights, whilst calling for prompt action on his part, were well calculated to embarrass and confuse him. Delay in acting was full of danger; there was no time for deliberation and consultation with others; and seeing the reversed movement of the engine, he would naturally conclude that the steamer had yielded or would soon yield to it and pass the approaching ship in safety.

Soon after he reached the bridge the "Harvest Queen" appeared through the darkness under full sail and bore down directly on the steamer. Before anything could be done her jibboom ran over the turtle-back of the steamer, and was broken in two, one part falling into the water. The engines of the steamer were then backing at full speed, and if she was not in fact going astern, she was, according to the finding of the Circuit Court, "not going ahead much, if any." She continued backing after the collision; and when the vessels separated, the "Harvest Queen" passed across the bow of the "Adriatic" from port to starboard. Her masts were standing and her sails were all set. The first officer of the steamer hailed her, but received no answer from any one; no hail came from her. She gave no signs of serious injury, yet she was in some way injured so severely that soon afterwards she sank with all on board.

Immediately after the separation of the vessels, the captain of the steamer gave orders to clear away the boats; but the "Harvest Queen" keeping in sight, the orders were countermanded, and the "Adriatic" steamed slowly towards her until she became lost to view. It was about that time that cries for help were heard in the water in the direction where the ship was last seen. The engines were stopped, and an order to lower the boats was immediately given. Two boats under

command of officers of the steamer put out in search of the parties from whom the cries were heard. They were rowed in the direction whence the cries came; but after remaining out for half an hour to an hour they were recalled by a signal from the steamer. Nothing was ever afterwards heard of any of the ship's crew, and only a few fragments of the vessel were ever found. The vessel and cargo were a total loss.

The present libel was filed to recover their value in damages, alleged to be $225,000. The libellants charge that the collision was caused by the negligence and improper conduct of those on board the steamer: —

1st, In not having a good and sufficient lookout;

2d, In running at too great a speed;

3d, In not keeping out of the way of the "Harvest Queen;" and,

4th, In not stopping and backing in time to avoid the collision.

From the narrative we have given of the facts of the case, which is but a summary of the findings of the Circuit Court, stating the facts with much greater detail and particularity, it is evident that these allegations are not sustained in any essential particular.

Whilst the vessels were over two miles apart, the green light on the "Harvest Queen" was distinctly seen. A similar light on the "Adriatic" could easily have been seen, and, if the lookouts were attending to their duty, probably was seen from the ship. Those lights being visible, it was only necessary for the vessels to keep in their course, and collision would have been impossible. The subsequent changes made by the steamer were caused by previous changes on the course of the ship, as indicated by the showing of her lights. Whilst it was the duty of the steamer to keep out of the way of the ship, being more under control, it was no less the duty of the ship to avoid anything tending to mislead and embarrass the steamer in the performance of this duty. That she did thus mislead and embarrass the steamer is plain from the statement already made. To one at a distance her changing lights were confusing, — indicating either doubt on the part of her officers as to the course to be taken, or, what is more likely to have been the case,

the absence of a good and sufficient lookout on board of the ship to report the sight and approach of the steamer.

The continued appearance of the green light for the first four minutes after it was seen answers the suggestion that the change of lights on the "Harvest Queen" was the result of the swinging of the vessel from the wind and sea, and not from an alteration in her course.

The general rule as to the conduct of a ship under circumstances like those presented in this case is much stronger against the course the "Harvest Queen" pursued than we have stated. The rule is for a sailing-vessel meeting a steamer to keep her course, while the steamer takes the necessary measures to avoid collision. In *Crockett* v. *Newton* we said that "though this rule should not be observed when circumstances are such that it is apparent its observance must occasion a collision, while a departure from it will prevent one, yet it must be a strong case which puts the sailing-vessel in the wrong for obeying the rule," 18 How. 581, 583; and in *New York & Liverpool U. S. Mail Steamship Co.* v. *Rumball*, that "under the rule that a steamer must keep out of the way, she must of necessity determine for herself and upon her own responsibility, independently of the sailing-vessel, whether it is safer to go to the right or left or to stop; and in order that she may not be deprived of the means of determining the matter wisely, and that she may not be defeated or baffled in the attempt to perform her duty in the emergency, it is required, in the admiralty jurisprudence of the United States, that the sailing-vessel shall keep her course, and allow the steamer to pass either on the right or left, or to adopt such measures of precaution as she may deem best suited to enable her to perform her duty and fulfil the requirement of the law to keep out of the way." 21 How. 372, 384.

Here, so far from observing this rule, the ship, by her frequent changes, embarrassed the action of the steamer, and prevented her from continuing in a course which would have avoided the disastrous result. If the ship had kept on the course she was sailing when first seen, or had adhered to the first new course afterwards taken, no collision would have happened.

It seems to us plain, upon the facts found by the Circuit Court, that whatever fault there was which caused the collision, it originated with the ship and not the steamer.

Decree affirmed.

DISTRICT OF COLUMBIA v. ARMES.

1. In a suit against a municipal corporation to recover damages for injuries received from a fall caused by a defective sidewalk, which was in an unguarded condition, it is competent for the plaintiff to show that whilst it was in that condition other like accidents had occurred at the same place.
2. A person affected with insanity is admissible as a witness, if it appears to the court, upon examining him and competent witnesses, that he has sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue.

ERROR to the Supreme Court of the District of Columbia.

The case is stated in the opinion of the court.

Mr. Albert G. Riddle and *Mr. Francis Miller* for the plaintiff in error.

Mr. Samuel Shellabarger and *Mr. Arthur A. Birney* for the defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

This was an action to recover damages for injuries received by the plaintiff's intestate, Du Bose, from a fall caused by a defective sidewalk in the city of Washington. In 1873, the board of public works of the city caused the grade of the carriageway of Thirteenth Street, between F and G Streets, to be lowered several feet. The distance between the curbstone of the carriageway and the line of the adjacent buildings was thirty-six feet. At the time the accident to the deceased occurred, this portion of the street — sidewalk it may be termed, to designate it from the carriageway, although only a part of it is given up to foot-passengers — was, for forty-eight feet north of F Street, lowered in its whole width to the same grade as the carriageway. But, for some distance beyond that point, only twelve

feet of the sidewalk was cut down, thus leaving an abrupt descent of about two feet at a distance of twelve feet from the curb. At this descent — from the elevated to the lowered part of the sidewalk — there were three steps, but the place was not guarded either at its side or end. Nothing was placed to warn foot-passengers of the danger.

On the night of Feb. 21, 1877, Du Bose, a contract surgeon of the United States army, while walking down Thirteenth Street, towards F Street, fell down this descent, and, striking upon his knees, received a concussion which injured his spine and produced partial paralysis, resulting in the impairment of his mind and ultimately in his death, which occurred since the trial below.

The present action was for the injury thus sustained. He was himself a witness, and it appeared from his testimony that his mind was feeble. His statement was not always as direct and clear as would be expected from a man in the full vigor of his mind. Still it was not incoherent, nor unintelligible, but evinced a full knowledge of the matters in relation to which he was testifying. A physician of the Government Hospital for the Insane, to which the deceased was taken two years afterwards, testified that he was affected with acute melancholy; that sometimes it was impossible to get a word from him; that his memory was impaired, but that he was able to make a substantially correct statement of facts which transpired before the injury took place, though, from the impairment of his memory, he might leave out some important part, that there would be some confusion of ideas in his mind, and that he should not be held responsible for any criminal act. A physician of the Freedmen's Hospital, in which the deceased was at one time a patient after his injuries, testified to a more deranged condition of his mind, and that he was, when there in June, 1879, insane. He had attempted to commit suicide, and had stuck a fork into his neck several times. Upon this, and other testimony of similar import, and the feebleness exhibited by the deceased on the stand, the counsel for the city requested the court to withdraw his testimony from the jury, on the ground that his mental faculties were so far impaired as to render him incompetent to testify as a witness. This the

court refused to do, but instructed the jury that his testimony must be taken with some allowance, considering his condition of mind and his incapacity to remember all the circumstances which might throw some light on his present condition. This refusal and ruling of the court constitute the first error assigned.

The ruling of the court and its instruction to the jury were entirely correct. It is undoubtedly true that a lunatic or insane person may, from the condition of his mind, not be a competent witness. His incompetency on that ground, like incompetency for any other cause, must be passed upon by the court, and to aid its judgment, evidence of his condition is admissible. But lunacy or insanity assumes so many forms, and is so often partial in its extent, being frequently confined to particular subjects, whilst there is full intelligence on others, that the power of the court is to be exercised with the greatest caution. The books are full of cases where persons showing mental derangement on some subjects evince a high degree of intelligence and wisdom on others. The existence of partial insanity does not unfit individuals so affected for the transaction of business on all subjects, nor from giving a perfectly accurate and lucid statement of what they have seen or heard. In a case in the Prerogative Court of Canterbury, counsel stated that partial insanity was unknown to the law of England; but the court replied that if by this was meant that the law never deems a person both sane and insane at one and the same time upon one and the same subject, the assertion was a truism; and added: "If, by that position, it be meant and intended that the law of England never deems a party both sane and insane at *different* times upon the *same* subject; and both sane and insane at the same time upon *different* subjects; (the most usual sense, this last, of the phrase 'partial insanity'), there can scarcely be a position more destitute of legal foundation; or rather there can scarcely be one more adverse to the stream and current of legal authority." *Dew* v. *Clark*, 3 Add. E. R. 79, 94.

The general rule, therefore, is, that a lunatic or a person affected with insanity is admissible as a witness if he have sufficient understanding to apprehend the obligation of an oath,

and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue; and whether he have that understanding is a question to be determined by the court, upon examination of the party himself, and any competent witnesses who can speak to the nature and extent of his insanity. Such was the decision of the Court of Criminal Appeal in England, in the case of *Reg.* v. *Hill*, 5 Cox, Crim. Cas. 259. There the prisoner had been convicted of manslaughter; and on the trial a witness had been admitted whose incompetency was urged on the ground of alleged insanity. He was a patient in a lunatic asylum, under the delusion that he had a number of spirits about him which were continually talking to him, but the medical superintendent testified that he was capable of giving an account of any transaction that happened before his eyes; that he had always found him so; and that it was solely with reference to the delusion about the spirits that he considered him a lunatic. The witness himself was called, and he testified as follows: "I am fully aware I have a spirit, and twenty thousand of them. They are not all mine. I must inquire. I can where I am. I know which are mine. Those that ascend from my stomach and my head, and also those in my ears. I don't know how many they are. The flesh creates spirits by the palpitation of the nerves and the rheumatics. All are now in my body and around my head. They speak to me incessantly, particularly at night. That spirits are immortal, I am taught by my religion from my childhood. No matter how faith goes, all live after my death, those that belong to me and those that do not." After much more of this kind of talk he added: "They speak to me instantly; they are speaking to me now; they are not separate from me; they are around me speaking to me now; but I can't be a spirit, for I am flesh and blood. They can go in and out through walls and places which I cannot." He also stated his opinion of what it was to take an oath: "When I swear," he said, "I appeal to the Almighty. It is perjury, the breaking of a lawful oath, or taking an unlawful one; he that does it will go to hell for all eternity." He was then sworn, and gave a perfectly collected and rational account of a transaction which he declared that he had witnessed. He was in

some doubt as to the day of the week on which it took place, and on cross-examination said: "These creatures insist upon it, it was Tuesday night, and I think it was Monday;" whereupon he was asked: "Is what you have told us what the spirits told you, or what you recollected without the spirits?" And he said: "No; the spirits assist me in speaking of the date, I thought it was Monday and they told me it was Christmas eve, Tuesday; but I was an eye-witness, an ocular witness to the fall to the ground." The question was reserved for the opinion of the court whether this witness was competent, and after a very elaborate discussion of the subject it was held that he was. Chief Justice Campbell said that he entertained no doubt that the rule laid down by Baron Parke, in an unreported case which had been referred to, was correct, that wherever a delusion of an insane character exists in any person who is called as a witness, it is for the judge to determine whether the person so called has a sufficient sense of religion in his mind and sufficient understanding of the nature of an oath, for the jury to decide what amount of credit they will give to his testimony.

"Various authorities," said the Chief Justice, "have been referred to, which lay down the law that a person *non compos mentis* is not an admissible witness. But in what sense is the expression *non compos mentis* employed? If a person be so to such an extent as not to understand the nature of an oath, he is not admissible. But a person subject to a considerable amount of insane delusion may yet be under the sanction of an oath and capable of giving very material evidence upon the subject-matter under consideration." And the Chief Justice added: "The proper test must always be, does the lunatic understand what he is saying, and does he understand the obligation of an oath? The lunatic may be examined himself, that his state of mind may be discovered, and witnesses may be adduced to show in what state of sanity or insanity he actually is; still, if he can stand the test proposed, the jury must determine all the rest." He also observed that in a lunatic asylum the patients are often the only witnesses of outrages upon themselves and others, and there would be impunity for offences committed in such places if the only per-

sons who can give information are not to be heard. Baron Alderson, Justice Coleridge, Baron Platt, and Justice Talfourd agreed with the Chief Justice, the latter observing that, "If the proposition that a person suffering under an insane delusion cannot be a witness were maintained to the fullest extent, every man subject to the most innocent, unreal fancy would be excluded. Martin Luther believed that he had a personal conflict with the devil; Dr. Johnson was persuaded that he had heard his mother speak to him after death. In every case the judge must determine according to the circumstances and extent of the delusion. Unless judgment and discrimination be applied to each particular case, there may be the most disastrous consequences." This case is also found in the 2d of Denison and Pearce's Crown Cases, 254, where Lord Campbell is reported to have said that the rule contended for would have excluded the testimony of Socrates, for he had one spirit always prompting him. The doctrine of this decision has not been overruled, that we are aware of, and it entirely disposes of the question raised here.

On the trial, a member of the Metropolitan police, who saw the deceased fall on the sidewalk and went to his assistance, was asked, after testifying to the accident, whether, while he was on his beat, other accidents had happened at that place. The court allowed the question against the objection of the city's counsel, for the purpose of showing the condition of the street, and the liability of other persons to fall there. The witness answered that he had seen persons stumble over there. He remembered sending home in a hack a woman who had fallen there, and had seen as many as five persons fall there.

The admission of this testimony is now urged as error, the point of the objection being that it tended to introduce collateral issues, and thus mislead the jury from the matter directly in controversy. Were such the case, the objection would be tenable; but no dispute was made as to these accidents, no question was raised as to the extent of the injuries received, no point was made upon them, no recovery was sought by reason of them, nor any increase of damages. They were proved simply as circumstances which, with other evidence, tended to show the dangerous character of the sidewalk in its un-

guarded condition. The frequency of accidents at a particular place would seem to be good evidence of its dangerous character, — at least, it is some evidence to that effect. Persons are not wont to seek such places, and do not willingly fall into them. Here the character of the place was one of the subjects of inquiry to which attention was called by the nature of the action and the pleadings, and the defendant should have been prepared to show its real character in the face of any proof bearing on that subject.

Besides this, as publicity was necessarily given to the accidents, they also tended to show that the dangerous character of the locality was brought to the attention of the city authorities.

In *Quinlan* v. *City of Utica*, 11 Hun, 217, which was before the Supreme Court of New York, in an action to recover damages for injuries sustained by the plaintiff through the neglect of the city to repair its sidewalk, he was allowed to show that while it was out of repair other persons had slipped and fallen on the walk where he was injured. It was objected that the testimony presented new issues which the defendant could not be prepared to meet; but the court said: "In one sense every item of testimony material to the main issue introduces a new issue; that is to say, it calls for a reply. In no other sense did the testimony in question make a new issue. Its only importance was that it bore upon the main issue, and all legitimate testimony bearing upon that issue, the defendant was required to be prepared for." This case was affirmed by the Court of Appeals of New York, all the judges concurring, except one, who was absent. 74 N. Y. 603.

In an action against the city of Chicago, to recover damages resulting from the death of a person who in the night stepped off an approach to a bridge while it was swinging around to enable a vessel to pass and was drowned, — it being alleged that the accident happened by reason of the neglect of the city to supply sufficient lights to enable persons to avoid such dangers, — the Supreme Court of Illinois held that it was competent for the plaintiff to prove that another person had, under the same circumstances, met with a similar accident. *City of Chicago* v. *Powers*, 42 Ill. 169. To the objection that the evidence was inadmissible, the court said: "The

action was based upon the negligence of the city in failing to keep the bridge properly lighted. If another person had met with a similar fate at the same place and from a like cause, it would tend to show a knowledge on the part of the city that there was inattention on the part of their agents having charge of the bridge, and that they had failed to provide proper means for the protection of persons crossing on the bridge. As it tended to prove this fact it was admissible; and if the appellants had desired to guard against its improper application by the jury, they should have asked an instruction limiting it to its legitimate purpose."

Other cases to the same general purport might be cited. See *Augusta* v. *Hafers*, 61 Ga. 48; *House* v. *Metcalf*, 27 Conn. 631; *Calkins* v. *City of Hartford*, 33 id. 57; *Darling* v. *Westmoreland*, 52 N. H. 401; *Hill* v. *Portland & Rochester Railroad Co.*, 55 Me. 438; *Kent* v. *Town of Lincoln*, 32 Vt. 591; *City of Delphi* v. *Lowery*, 74 Ind. 520. The above, however, are sufficient to sustain the action of the court below in admitting the testimony to which objection was taken.

Judgment affirmed.

McLAUGHLIN *v.* UNITED STATES.

1. Where a bill was filed in the Circuit Court by the District Attorney in the name of the United States, to vacate a patent for lands, but no objection touching his authority to bring the suit was made, and a duly certified copy of a letter whereby he was directed by the Attorney-General to institute the requisite proceedings was filed here, — *Held*, that the decree for the complainant will not be reversed on such an objection raised here for the first time.
2. The patent in question, bearing date May 31, 1870, and issued to a railroad company, in professed compliance with the terms and conditions of the grant made by the acts commonly known as the Pacific Railroad Acts, covers lands which, the bill alleges, contain valuable quicksilver and cinnabar deposits, and were known to be "mineral lands" when the grant was made and the patent issued. This court, being satisfied that the material allegations of the bill are true, that as early as 1863 and since cinnabar was mined upon the lands, and that at the time of the application for a patent their character was known to the defendant, the agent of the company, who now claims them under it, affirms the decree cancelling the patent and declaring his title to be null and void.

8. *Quære*, What extent of mineral, other than coal and iron, found in lands will exclude them from the said grant; and can the United States maintain a suit to set aside a patent, if, before it was issued, the lands therein mentioned were not known to be mineral, and, if so, what are the rights of innocent purchasers from the patentee.

APPEAL from the Circuit Court of the United States for the District of California.

The case is stated in the opinion of the court.

Mr. Henry Beard for the appellant.

Mr. Assistant Attorney-General Maury for the United States.

MR. JUSTICE MILLER delivered the opinion of the court.

John M. Coghlan, District Attorney of the United States for the District of California, on behalf of the United States, brought in the court below the bill in this case against Charles McLaughlin and The Western Pacific Railroad Company, to set aside a patent of the United States, bearing date May 31, 1870, and conveying to the company the northeast quarter of section 29, township one north, range one east, of Mount Diabolo meridian.

This patent was made under the acts of Congress granting to the Union Pacific, Central Pacific, and Western Pacific Railroad Companies the alternate sections of public land within certain limits on each side of their respective roads, and authorizing the issue of patents for the same when the work should be done and the sections ascertained. There were excepted out of this grant, among others, such sections or parts of sections as were mineral lands.

The bill alleges that the quarter-section in question is, and at the time of the grant was, mineral land, and as it was known to be such, the patent therefor was issued by inadvertence and mistake without authority of law.

The patent itself is not in the record as an exhibit, or as a part of the evidence. The railroad company, though made a defendant, was not served with the subpœna and did not appear. McLaughlin, the only defendant who appeared, defends as purchaser two degrees removed from the company. Instead of a general replication to his answer, the reply is an amendment to the original bill. A decree was rendered for the complainant, and he appealed.

The whole record is so imperfect and the case so obscurely presented that we feel tempted to dismiss it. Waiving, however, these objections, there is enough to enable us to consider the two principal errors assigned by the appellant. The first is that there is no sufficient evidence that the suit was instituted under the authority of the Attorney-General, according to the principle established in *United States* v. *Throckmorton*, 98 U. S. 61. To this it may be answered that the objection was not raised below, as it was in that case; that the case is argued here on behalf of the government by the Assistant Attorney-General, who files a certified copy of the order of the Attorney-General directing the District Attorney to bring the suit in the Circuit Court, as requested by the Secretary of the Interior. We think the decree, under these circumstances, can hardly be reversed now, on this ground, taken here for the first time.

The other objection to the decree in favor of the United States is that the evidence does not establish that the land in controversy was mineral land when the patent was issued.

An examination of the evidence on this subject convinces us that the circuit judge was right in holding that it was. It is satisfactorily proven, as we think, that cinnabar, the mineral which carries quicksilver, was found there as early as 1863; that a man named Powell resided on the land and mined this cinnabar at that time, and in 1866 established some form of reduction works there; that these were on the ground when application for the patent was made by defendant, McLaughlin, as agent of the Western Pacific Railroad Company, and that these facts were known to him. He is not, therefore, an innocent purchaser. Concurring as we do with the Circuit Court in the result arising from the evidence, we do not deem it necessary to give in this opinion a detailed examination of it.

This being the first case of the kind in this court, a class of cases which may possibly be indefinitely multiplied, it is to be regretted that it was not more fully presented in the Circuit Court. Many interesting questions might arise in this class of cases not proper to be considered in this case. For instance, the nature and extent of mineral found in the land granted or

patented which will bring it within the designation of *mineral land* in the various acts of Congress, in which it is excepted out of grants to railroad companies, and forbidden to be sold or pre-empted as ordinary or agricultural lands are.

Suppose that when such land has been conveyed by the government it is afterwards discovered that it contains valuable deposits of the precious metals, unknown to the patentee or to the officers of the government at the time of the conveyance, will such subsequent discovery enable the government to sustain a suit to set aside the patent or the grant? If so, what are the rights of innocent purchasers from the grantee, and what limitations exist upon the exercise of the government's right? We can answer none of these questions here, and can only order that the decree below be

Affirmed.

PANA v. BOWLER.

1. The act of the General Assembly of Illinois approved Feb. 24, 1869, amendatory of an act entitled "An Act to incorporate the Illinois Southeastern Railway Company," approved Feb. 25, 1867, removed the limitation of $30,000 imposed upon the amount which, by the latter act, "any town in any county under township organization is authorized and empowered to donate to said company."
2. The court reaffirms the ruling in *Harter* v. *Kernochan*, 103 U. S. 562, that the duly signed and countersigned township bonds, payable to the company or bearer, which recite that they are duly issued in compliance with the vote of the legal voters of the township, cast at an election held by virtue of the above-mentioned acts of Feb. 25, 1867, and Feb. 24, 1869, are valid in the hands of a *bona fide* holder.
3. An irregularity in conducting the election will not defeat a recovery on the bonds, or on the coupons thereto attached, nor overcome the presumption that the plaintiff, in the usual course of business, became at their date the holder of them for value.
4. A decree *in personam*, rendered by a court of the State of Illinois, declaring the bonds to be void, does not bind a non-resident holder of them who was not named as a party to the suit and did not appear therein, and who had no notice of the pendency thereof other than by a publication addressed to the "unknown holders and owners of bonds and coupons issued by the town of Pana."
5. Coupons after their maturity bear interest at the rate prescribed by the law of the place where they are payable.

ERROR to the Circuit Court of the United States for the Southern District of Illinois.

This was an action of assumpsit brought by James H. Bowler and Isaac H. Merrill against the town of Pana, Illinois, upon coupons cut from certain bonds issued by the town, dated June 23, 1873. The defendant pleaded the general issue, and the parties having waived a jury, submitted the case to the court upon the facts as well as the law. The court found the issues of fact for the plaintiffs, and rendered judgment in their favor for $7,272.02. This writ of error is brought by the defendant to review that judgment.

The parties made an agreed statement, and the court a special finding, of facts. From these and the pleadings in the case the following facts appear: —

On Feb. 25, 1867, an act was passed by the Illinois legislature "to incorporate the Illinois Southeastern Railway Company." Sects. 9 and 10 of this act declared as follows: —

"SECT. 9. Any town, in any county under township organization, is hereby authorized and empowered to donate to said company any amount, not to exceed thirty thousand dollars: *Provided*, that no such donation by any such town to said company shall be made, unless the question of making such donation shall have been first submitted to the legal voters of such town at an election hereafter to be provided for: *And provided further*, that no donation so made, nor any part thereof, nor any interest accruing thereon, or upon any part thereof, shall be paid, or become due or payable to said company, until said company, or its assigns or employés, shall have completed their said railroad, or some certain part of said road, or its branch, as may have been agreed upon by the contracting parties.

"SECT. 10. No such election for the purpose of submitting the question of making a donation by any such town, authorized by section 9 of this act to donate to this company, shall be held until the directors of said company shall have filed a proposition to the inhabitants of said town with the county clerk of the county wherein such town is situate, and a copy of the same with the clerk of said town, and, if there be a newspaper published in said county, said proposition shall be published in full in the same, whereupon it shall be the duty of the clerk of such town to post up printed or written notices of the time and place of holding such

election in at least ten public places in such town, together with a copy of such proposition, at least twenty days before the day for holding such election; at which election the legal voters of such township shall vote for or against such proposition; and if a majority of all the votes cast be for such proposition, the trustees of such town shall so certify the same to the clerk of the county court of the county wherein the town is situated, and such county clerk shall, upon application of the company, after the donation so voted by any such town shall have become due and payable, under the terms and conditions of the proposition under which said election was rendered, compute and assess upon all the taxable property in said town an amount sufficient to pay such donation, or any part or instalment of the same so then being due and payable; which taxes so assessed shall be collected as other taxes; and the taxes so collected shall be paid to the treasurer of said company. And the election herein provided for shall be held, canvassed, and returned as other regular town elections."

Afterwards, on Feb. 24, 1869, another act was passed to amend the act to incorporate the Illinois Southeastern Railway Company, sect. 10 of which was as follows: —

"SECT. 10. That any village, city, county, or township organized under the township organization law, or any other law of this State, along or near the route of said railway or its branches, or that are in anywise interested therein, may, in their corporate capacity, subscribe to the stock of said company, or render donations to said company to aid in constructing and equipping said railway: *Provided*, that no such subscriptions or donations shall be made until the same shall be voted for, as hereinafter provided. That whenever twenty legal voters of any such city, village, county, or township shall present to the clerk thereof a written application requesting that an election shall be held to determine whether such village, city, county, or township shall subscribe to the capital stock of said company or make a donation thereto, to aid in building or equipping said railway, stating the amount, and whether to be subscribed or donated, and the rate of interest and times of payment of the bonds to be issued in payment thereof, such clerk shall receive and file such application, and shall immediately proceed to post written or printed notices, calling an election to be held by the legal voters of such village, city, county, or township, which notice shall be posted in ten of the most public places of

such village, city, county, or township. for thirty days preceding an election; and said notices shall state fully the object of such election, and such election shall be held and conducted, and returns thereof made as in general elections provided by law in this State, and as provided by the charters of any such village or city: *Provided*, that at any election held under the provisions of this act it shall not be necessary to cause a registration of the voters of such villages, cities, counties, or townships; and if a majority of the votes cast at such election shall be in favor of such subscription or donation, then the corporate authorities of such village, city, county, or township, organized under the township organization laws of this State, the supervisors of such township shall subscribe to the capital stock of said company or donate thereto, as shall have been determined at such election, the amount so voted at such election, and shall issue the bonds with interest coupons attached, . . . said bonds to be signed, . . . in case of a township, by the supervisor thereof, and . . . to be countersigned by the clerk of said . . . township," &c.

Afterwards the Springfield and Illinois Southeastern Railway Company, to which the bonds in question in this case were issued, was created by the consolidation of the Pana, Springfield, and Northwestern Railroad Company and the Illinois Southeastern Railway Company. The consolidation was authorized by the charters of the two companies, and the new company succeeded to all the rights, franchises, and powers of the constituent companies. *Harter* v. *Kernochan*, 103 U. S. 562. In pursuance of sect. 10 of the said act of Feb. 24, 1869, a petition was presented to the town clerk of Pana Township to order an election to be held on April 30, 1870, to decide whether said township should donate to the Springfield and Illinois Southeastern Railway Company the sum of $100,000 in bonds to fall due in twenty years, or at the option of the township in five years from this date, with interest at the rate of eight per cent per annum, payable semi-annually. On April 30, 1870, an election was held in said township in pursuance of the petition, and a notice thereof given according to law. The meeting at which the election was held was called to order by the town clerk, and one J. W. Stark was on motion chosen moderator, and was sworn in by the town clerk and presided over the election. At the election

thus held four hundred and thirty-eight votes were cast for and twenty-four against said donation. In the spring, summer, and fall of the year 1873, the supervisor and town clerk of said township, in pursuance of said election and without any other authority of law than said election and the charters and amendments above referred to, issued to the Springfield and Illinois Southeastern Railway Company one hundred bonds of the township of Pana, of $1,000 each, payable and bearing interest according to the rate aforesaid. All the bonds were of like tenor and effect except as to their number. The following is a copy of one of them: —

"UNITED STATES OF AMERICA.

"STATE OF ILLINOIS, COUNTY OF CHRISTIAN.

"No. 6.] Pana Township. [$1,000.

"Eight per cent. railroad bond. Registered by auditor of public accounts. Principal and interest collected and paid by the treasurer of State of Illinois.

"Know all men by these presents that the township of Pana, in the county of Christian, and State of Illinois, acknowledges itself indebted to the Springfield and Illinois Southeastern Railway Company, or bearer, in the sum of one thousand dollars, with interest from the date hereof, at the rate of eight per cent. per annum, payable semi-annually on the first days of January and July of each year, at the agency of the State treasurer of the State of Illinois, in New York City, on the presentation and surrender of the respective interest coupons hereto attached. The principal of this bond shall be due and payable after five years and within twenty years of the date hereof, at the option of said township, at said agency in the city of New York.

"This bond is one of a series amounting to one hundred thousand dollars, issued by said township in compliance with the vote of the legal voters thereof at an election held on the thirtieth day of April, A. D. 1870, under and by virtue of the authority conferred by an act of the General Assembly of the State of Illinois, entitled 'An Act to incorporate the Illinois Southeastern Railway Company,' approved February 25th, 1867, and an act amendatory thereof, approved February 24th, 1869, and in accordance with the provisions of an act of said General Assembly, entitled 'An Act to fund and provide for paying the railroad debts of counties,

cities, townships, and towns,' in force April 16th, 1869. And for the payment of said sum of money and accruing interest thereon, in the manner aforesaid, the faith of the said township of Pana is hereby irrevocably pledged, as is also its property, revenue, and resources.

"In testimony whereof the said township of Pana has caused these presents to be signed by its supervisor and countersigned by its clerk, this twenty-eighth day of June, A. D. 1873.

"GROVE P. LAWRENCE, *Supervisor.*

"EDWIN SANDERS, *Clerk.*"

At the time the bonds and coupons were issued Grove P. Lawrence was the supervisor of said township of Pana, and Edwin Sanders was its clerk, and their signatures to the bonds and coupons are genuine.

The coupons attached to said bonds were all of the same tenor and effect, except in respect of their numbers. The following is a copy of the coupon attached to the above recited bond: —

"$40. The township of Pana, Christian County, Illinois, will pay the bearer forty dollars on the 1st of January, 1882, at the agency of her State treasurer in the city of New York, it being six month's interest on bond No. 6.

"GROVE P. LAWRENCE,

"*Supervisor of said Township.*"

On the back of every bond was the following indorsement: —

"AUDITOR'S OFFICE, ILLINOIS,

"SPRINGFIELD, June 28th, 1873.

"I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled 'An Act to fund and provide for paying the railroad debts of counties, townships, cities, and towns,' in force April 16, 1869.

"In testimony whereof I have hereunto subscribed my name and affixed the seal of my office the day and year aforesaid.

[SEAL.] "C. E. LIPPINCOTT, *Auditor, P. A.*"

The act referred to in this certificate provided that certain taxes, therein specified, should be applied to the payment of the principal and interest of bonds registered in the office of

the auditor of public accounts, and that no bonds should be so registered until the railroad, in aid of which the bonds had been issued, should have been completed near to or in the township issuing the bonds, and unless the subscription or donation creating the debt to pay which the bonds were issued had been first submitted to an election of the legal voters of said township under the provision of the laws of the State, and a majority of the legal voters living in such township had been in favor of such aid, subscription, or donation. And it was made the duty of the supervisor of the township, upon the completion of the railroad near to or through the township by which the bonds were issued, to certify under oath to the State auditor that all the preliminary conditions required by the act to be done to authorize the registration of the bonds and to entitle them to the benefits of the act had been complied with. See Hurd's Revised Statutes, 1880, p. 807, sect. 17.

The record in this case showed that the certificate above mentioned in reference to the issue of the bonds in question had been made by Grove P. Lawrence, the supervisor of Pana Township, and transmitted by him to the auditor of public accounts.

The interest on said issue of $100,000 of bonds was levied and collected and paid for three years by the State treasurer as provided by law.

It further appeared that in the year 1876 the town of Pana and three taxpayers filed, in behalf of themselves and all other taxpayers of the town, a bill in the Circuit Court of Christian County against the auditor of public accounts of the State of Illinois, the treasurer of the State of Illinois, the treasurer and the clerk of Christian County, Illinois, the town collector of the town of Pana, and H. N. Schuyler, William E. Hayward, John Vedder, and William Houston, and "the unknown holders and owners of said bonds and coupons issued by the town of Pana," as defendants, in which the complainants prayed that said public officers might be perpetually enjoined from levying a tax with which to pay said bonds and coupons, and that said bonds might be declared void, and that said holders and owners of said bonds might be perpetually enjoined from selling or negotiating or suing upon said bonds or the coupons attached

to them, or pretending or insisting in any court of law or equity or elsewhere, in any manner whatsoever, that said town was liable upon said bonds or coupons.

The parties made defendant by name were either served with process, or they voluntarily appeared in the case. It was assumed that "the unknown holders and owners of said bonds and coupons issued by the town of Pana" were brought in by publication of a notice to them under that designation in a newspaper, according to the laws of the State of Illinois. The Circuit Court of Christian County dismissed the bill, but the appellate court, upon appeal, reversed its decree and directed it to grant the prayer of the bill; and the decree of the appellate court was affirmed by the Supreme Court, to which the case was carried by the defendants. Afterwards, at its November Term, 1879, to wit, on December 17, the Circuit Court, upon receiving the mandate of the appellate court and of the Supreme Court, entered a decree in favor of the complainants, in accordance with the prayer of the bill.

The coupons offered in evidence being those upon which the suit was brought, were, at the time of the trial and before the commencement of the suit, held and owned by the plaintiffs, who were citizens of the State of Maine.

Such were the material facts of the case. The town of Pana, by its assignments of error, insists: —

1. That there was no authority in the charter of the Springfield and Illinois Southeastern Railway Company to hold an election and issue bonds to the amount of $100,000.

2. That the election held on April 30, 1870, was illegal and void, because it was presided over by a moderator and not by the supervisor, assessor, and collector, as required of general elections by the law of the State, and, therefore, conferred no authority upon the supervisor and town clerk to issue said bonds and coupons.

3. That it was incumbent on the plaintiffs below, the bonds having been illegally issued, to prove that they were *bona fide* holders of the coupons for value, which they failed to do.

4. That no judgment could be rendered for the plaintiffs on said coupons after they and the bonds to which they belonged

had been declared void by the decree of the Circuit Court of Christian County.

5. That in any event the judgment was too large by $572.22.

Mr. William J. Henry for the plaintiff in error.

Mr. George A. Sanders for the defendant in error.

MR. JUSTICE WOODS delivered the opinion of the court, and, after making the foregoing statement, proceeded as follows: —

The people of the township of Pana voted almost unanimously for the donation to pay which the bonds in this case were issued. There is no pretence of any fraud in their issue. It is not disputed that the railroad company complied on its part with all the conditions upon which they were to be issued, or that the township has received all for which it bargained in consideration of the issue of them. They were registered in the office of the auditor of public accounts, where they could not be lawfully registered unless the election authorizing the donation for which they were issued had been held in pursuance of the statute, and the sworn certificate of the supervisor of the township to that effect had been filed with the auditor. The township has paid the interest on them for three years. Under these circumstances, if they and the coupons thereto attached are in the hands of *bona fide* holders for value, the defences through which the township can escape liability will be reduced to narrow limits.

The charter of the Illinois Southeastern Railway Company declared that any town in any county under township organization might donate to the company any amount not to exceed $30,000. The question is raised by the first assignment of error whether this limit was removed by the amendatory act of Feb. 24, 1869. We think that it was.

Section 10 of the act last named is an entire revision of sections 9 and 10 of the original charter of the company. The original charter authorized townships only to make donations to the railroad company, and it required that the railroad, or some part of it or its branches, should be completed before the donation was paid. It did not authorize the issue of bonds to pay the donations, but required the assessment and collection

of a tax upon all the taxable property of the town for that purpose.

The amendatory act authorized not only townships, but also villages, cities, and counties along the route of the railroad to make donations to the company. It prescribed an entirely different condition precedent to the making of a donation, and required the issue of bonds to pay the donation when made, and it did not require the completion of the railroad, or any part of it, before the bonds were issued. It did not limit the amount which might be donated to $30,000, but declared that if a majority of the votes cast at the election provided for by the act should be in favor of donation, the corporate authorities of the village, city, county, or township, as the case might be, should donate to the company the amount so voted at said election, and issue bonds in payment thereof. It thus appears that sect. 10 of the amendatory act covered the entire subject embraced by sects. 9 and 10 of the original act. It related to the same railroad company; it prescribed different methods of procedure in reference to the same subject, and embraced entirely new provisions, thus plainly showing that it was intended as a substitute, *pro tanto*, for the original act. Sect. 10 of the amendatory act therefore operated as a repeal, by implication of sects. 9 and 10 of the original act, and removed the restriction limiting to $30,000 the amount which could be donated by a township to the railroad company. *United States* v. *Tynen*, 11 Wall. 88; *Henderson's Tobacco*, id. 652; *Murdock* v. *City of Memphis*, 20 id. 590; *King* v. *Cornell*, 106 U. S. 395.

The next question raised by the assignments of error relates to the power of the township of Pana, under the circumstances of this case, to issue the bonds in question. This court decided, in *Harter* v. *Kernochan*, 103 id. 562, that bonds issued by the township of Harter, dated April 1, 1880, signed by the supervisor and countersigned by the clerk of the township, reciting that they were issued in pursuance of the acts of Feb. 25, 1867, and Feb. 24, 1869, which are the acts relied on in this case, and in pursuance of an election of the legal voters of the township held Nov. 10, 1868, were valid obligations of the township.

The power of the township of Pana, under the same acts, to issue bonds to pay its donation to the same railroad company is, therefore, settled beyond dispute, unless what the plaintiff in error insists was a defect in the method of conducting the election by which the donation was voted is fatal to the authority of the officers of the township to issue the bonds. This defect was that the election was presided over and the returns made, not by the supervisor, assessor, and collector of the township, *ex officio* judges of elections, but by a moderator chosen by the electors present.

It is insisted by the plaintiff in error that as the Constitution of Illinois, adopted July 2, 1870, by its second additional section cut off the power of any township or other municipality to subscribe to the capital stock of, or make a donation to, any railroad company, except when such subscription or donation had been authorized under existing laws, by a vote of the people of the municipality prior to the adoption of the Constitution, and as, by reason of the defect just mentioned, there was no legal election, it follows that there was no authority in the officers of the township of Pana to make the donation or issue the bonds in question in this case, and that the bonds are not binding on the township. We cannot assent to this conclusion.

It is clear that this case in no wise differs from other cases where the holding of an election and a vote of the people in favor of an issue of bonds is made by law a condition precedent upon which the authority to issue bonds rests.

The bonds in question in this case recite on their face that they were issued by the township, in compliance with the vote of the legal voters thereof at an election held on April 30, 1870, under and by virtue of the authority conferred by acts of the General Assembly of the State of Illinois, specifying the acts of Feb. 26, 1867, and Feb. 24, 1869, above mentioned.

This court has again and again decided that if a municipal body has lawful power to issue bonds or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such as a popular election of the constituent body, the holder in good faith has the right to assume that such preliminary proceedings have taken place if the fact be certified

on the face of the bonds by the authorities whose primary duty it is to ascertain it. *Lynde* v. *The County*, 16 Wall. 6; *Town of Coloma* v. *Eaves*, 92 U. S. 484; *Commissioners* v. *January*, 94 id. 202; *Commissioners* v. *Bolles*, id. 104; *County of Warren* v. *Marcy*, 97 id. 96.

The authority to issue the bonds in question in this case, resting upon the fact that an election was held in pursuance of law before a certain date, namely, the date when the Constitution of 1870 was adopted, and the bonds reciting on their face the fact that the election was so held before the date mentioned, the circumstance that the election was irregularly conducted can be of no avail as a defence to the bonds in a suit brought by a *bona fide* holder.

Our attention has been called to the decision of the Supreme Court of Illinois in the case heretofore mentioned and reported as *Lippincott* v. *Town of Pana*, 92 Ill. 24, in which it was held that the election relied on in this case as the authority for the issue of the bonds was absolutely void, and the issue of them was, therefore, without authority. Our attention is also called to *People* v. *Town of Santa Anna*, 67 id. 57, and *People* v. *Town of Laenna*, id. 65, where similar elections under a like statute were held void. These last two cases were decided before the bonds in this case were issued. They were, however, suits brought to restrain the issue of bonds by the township officers, on account of the irregularities in the election. The rights of *bona fide* holders could not, therefore, arise, and were not passed on in those cases. But in the case first mentioned the bonds had been issued, and were presumptively in the hands of *bona fide* holders. Nevertheless, the Supreme Court of Illinois held the bonds to be void in whosesoever hands they might be.

It is insisted that this court is bound to follow this decision of the Supreme Court of Illinois and hold the bonds in question void. We do not so understand our duty. Where the construction of a State constitution or law has become settled by the decision of the State courts, the courts of the United States will, as a general rule, accept it as evidence of what the local law is. Thus, we may be required to yield against our own judgment to the proposition that, under the charter of the

railway company, the election in this case, which was held under the supervision of a moderator chosen by the electors present, was irregular and therefore void. But we are not bound to accept the inference drawn by the Supreme Court of Illinois, that in consequence of such irregularity in the election the bonds issued in pursuance of it by the officers of the township, which recite on their face that the election was held in accordance with the statute, are void in the hands of *bona fide* holders. This latter proposition is one which falls among the general principles and doctrines of commercial jurisprudence, upon which it is our duty to form an independent judgment, and in respect of which we are under no obligation to follow implicitly the conclusions of any other court, however learned or able it may be. *Swift* v. *Tyson*, 16 Pet. 1; *Russell* v. *Southard*, 12 How. 139; *Watson* v. *Tarpley*, 18 id. 517; *Butz* v. *City of Muscatine*, 8 Wall. 575; *Boyce* v. *Tabb*, 18 id. 546; *Oates* v. *National Bank*, 100 U. S. 239; *Railroad Company* v. *National Bank*, 102 id. 14. See also *Burgess* v. *Seligman*, *ante*, p. 20, where the question, how far the courts of the United States are bound by the decisions of the State courts, is carefully re-examined, and the rule on the subject stated with precision.

We cannot follow the decision of the Supreme Court of Illinois in *Lippincott* v. *Town of Pana*, *ubi supra*, without overruling a uniform current of the decisions of this court, beginning with *Commissioners of Knox County* v. *Aspinwall*, 21 How. 539, and continuing down to the present time. The rights of the *bona fide* holder of negotiable municipal bonds, as we have stated them in this opinion, are too firmly settled by the decisions of this court to be shaken.

Our conclusion is, therefore, that the bonds in question in this case are valid in the hands of a *bona fide* holder, notwithstanding the irregularity in the conduct of the election by which they were claimed to be authorized.

The next question presented by the assignments of error is, Does the irregularity in the conduct of the election throw on the plaintiffs the burden of proving that they are holders for value?

It is a general rule that when the holder of a negotiable in-

strument, regular on its face and payable to bearer, produces it in a suit to recover its contents, and the same has been received in evidence, there is a *prima facie* presumption that he became the holder of it, for value at its date, in the usual course of business. *Murray* v. *Lardner*, 2 Wall. 110; *Bank of Pittsburgh* v. *Neal*, 22 How. 96; *Collins* v. *Gilbert*, 94 U. S. 753; *Brown* v. *Spofford*, 95 id. 474. And municipal bonds, payable to bearer, are subject to the same rules as other negotiable paper. *Cromwell* v. *Sac County*, 96 id. 51.

But the plaintiff in error insists that this case falls within an exception to that rule, and cites to sustain his position *Smith* v. *Sac County*, 11 Wall. 139, and *Stewart* v. *Lansing*, 104 U. S. 505. The exception relied on by the plaintiff in error is well settled, and is this: if, in a suit brought by the indorsee or transferee of a negotiable instrument, the maker or acceptor, or any party who is primarily bound by the original consideration, proves that there was fraud or illegality in the inception of the instrument, the burden of proof is thrown on the plaintiff to show that he is a holder for value. *Smith* v. *Sac County* and *Stewart* v. *Lansing*, *ubi supra*; *Commissioners* v. *Clark*, 94 U. S. 278; *Collins* v. *Gilbert*, id. 753; *Fitch* v. *Jones*, 5 El. & Bl. 238; *Smith* v. *Braine*, 16 Ad. & E. N. S. 244; *Hall* v. *Featherstone*, 3 Hurls. & Nor. 284; *Bailey* v. *Bidwell*, 13 Mee. & W. 73; *Vathir* v. *Zane*, 6 Gratt. (Va.) 246; *Hutchinson* v. *Boggs*, 28 Pa. St. 294; *Perrin* v. *Noyes*, 39 Me. 384; *Cottle* v. *Cleaves*, 70 id. 256; *Sistermans* v. *Field*, 9 Gray (Mass.), 331; *Woodhull* v. *Holmes*, 10 Johns. (N. Y.) 231; *Ross* v. *Drinkard's Adm.*, 35 Ala. 434; *Harbison* v. *Bank of the State of Indiana*, 28 Ind. 133; *Fuller* v. *Hutchings*, 10 Cal. 523; *Redington* v. *Woods*, 45 id. 406; *Conley* v. *Winsor*, 41 Mich. 253; *Sloan* v. *Union Banking Company*, 67 Pa. St. 470; *Holme* v. *Karsper*, 5 Binn. (Pa.) 469; *Vallett* v. *Parker*, 6 Wend. (N. Y.) 615; *Munroe* v. *Cooper*, 5 Pick. (Mass.) 412; 1 Daniel on Neg. Ins. (3d ed.), sect. 815.

In most of the cases above cited the defence relied on was fraud in the inception of the instrument. Thus, in *Smith* v. *Sac County*, 11 Wall. 139, the report shows that the bonds were issued to a contractor to pay for the building of a court-house; that the county judge who executed and delivered

them was bribed to do so; and that the court-house never was built.

In *Stewart* v. *Lansing*, 104 U. S. 505, the county judge, assuming to act under authority of a law of the State, rendered a judgment appointing commissioners to execute bonds of the town of Lansing. This judgment was carried by *certiorari* to the Supreme Court, and there reversed. The county judge, the commissioners, and the railroad company to which the bonds were ordered to be issued, all had notice of the *certiorari* and the subsequent proceedings under it. Before the judgment of reversal, however, the commissioners, notwithstanding the pendency of the writ, issued the bonds in suit in the case, taking from the company an obligation for their personal indemnity. This court held that as between the company and the town the judgment of reversal was equivalent to a refusal by the county judge to make the original order, and invalidated the bonds.

There is no pretence of any fraud in the inception of the bonds in question in this case. It is not denied that they were issued in good faith and for a valuable consideration. The question, then, arises, Is the irregularity in the conduct of the election such an illegality as throws on the plaintiff the burden to show that he paid value for the coupons? We are clearly of opinion that it is not.

It will appear from an examination of the cases above cited, in which the defence was illegality in the inception of the instrument, that the illegality which shifts the burden of proof on the holder to prove that he paid value must be something which relates to the consideration of the paper sued on. It must appear that the consideration arose out of a transaction contrary to law, or against public policy. Thus, in *Sistermans* v. *Field*, 9 Gray (Mass.), 331, the illegality which the court held threw the burden on the plaintiff of proving that he gave value for the notes sued on, was the fact alleged by the defendant that they were given in payment for intoxicating liquors sold by the payee of the notes to the defendant in violation of law. Precisely the same illegality was held in *Cottle* v. *Cleaves*, 70 Me. 256, to throw upon the plaintiff, who was indorsee, the burden of showing that he paid value for the note.

So in *Fuller* v. *Hutchings*, 10 Cal. 523, the paper sued on was given for losses at a public banking game called "faro." Gaming was prohibited by statute. It was declared by the laws of California to be a felony in the keeper of the game, and a misdemeanor in the player. In this case the court held that the illegal consideration being admitted, it devolved upon the plaintiff to show that he took the paper without notice and for value.

In the case of *Bailey* v. *Bidwell*, 13 Mee. & W. 73, it was alleged, as matter of defence, that the consideration for the note sued on was an agreement that the payee should not oppose a petition in bankruptcy filed by the defendant, the maker of the note, and that the note was indorsed to the plaintiff without value. The court, by Baron Parke, held the rule to be that if the note was proven to have been obtained by fraud, or affected by illegality, that afforded a presumption that the person who had been guilty of the illegality would dispose of it, and place it in the hands of another person to sue on it, and that such proof casts upon the plaintiff the burden of showing that he was a *bona fide* indorsee for value.

In *Fitch* v. *Jones*, 5 El. & Bl. 238, the note which was sued on by an indorsee was given for a wager on the hop duty. This, the court said, was not within the statute of Anne or any other statutes which prohibit wagers. There was no penalty imposed for such a wager, and, therefore, as between the maker and payee, there was no illegality or violation of law, but it was a mere *nudum pactum*. And the court held that the defendant was bound to prove his plea by showing that the plaintiff did not give value for the note.

The authorities illustrate the rule and show that it does not apply to this case. There was no illegality whatever in the consideration of the bonds in question in this suit. The mere irregularity in the conduct of the election was not such an illegality as is contemplated by the rule, and does not deprive the holder of the coupons of the presumption that he acquired them for value.

The next contention of the plaintiff in error is that the decree of the Circuit Court of Christian County, Illinois, by which the bonds in question were declared void, is binding on the

plaintiffs in this case, and is a bar to the action upon the coupons sued on.

The plaintiffs in this case are citizens of the State of Maine. It is sought to bind them by a decree rendered in a proceeding purely *in personam* in a case in which they were not named as parties, when there was no personal service upon or appearance by them, and when the only pretence of notice to them of the pendency of the suit was a publication addressed to the "unknown holders and owners of bonds and coupons issued by the town of Pana."

It is contended that, under the statutes of Illinois, parties may be thus brought in and a valid personal decree rendered against them. Whatever may be the effect of such a decree upon citizens of the State of Illinois, this court has held that, as to non-residents, it is absolutely void. *Cooper* v. *Reynolds*, 10 Wall. 308; *Pennoyer* v. *Neff*, 95 U. S. 714; *Brooklyn* v. *Insurance Company*, 99 id. 362; *Empire* v. *Darlington*, 101 id. 87.

In a case decided at the present term it was declared by this court, speaking by Mr. Justice Field, that "the courts of the United States only regard judgments of the State courts establishing personal demands as having validity or importing verity when they have been rendered upon personal citation of the party or upon his voluntary appearance." *St. Clair* v. *Cox*, 106 id. 350, 353.

These authorities settle the rule which is conclusive of this question. It would be a reproach to jurisprudence if the rights of citizens of Maine to recover the contents of a chose in action, held and owned by them, could be cut off by a suit in Illinois to which they were not made parties by name, and in which there was no personal service or appearance.

It is insisted by counsel for the plaintiff in error that the decree of the State court recites the fact that the persons made defendants under the designation of "the unknown holders and owners of bonds and coupons issued by the town of Pana," which includes the defendants in error, appeared in that court, and that they are, therefore, concluded by the decree in the case.

There is no pretence that there was any appearance in fact

of the parties referred to. It is sought to conclude them by a loose expression in the decree, which, in our opinion, was clearly not intended to recite their appearance, and is not fairly open to such a construction.

Lastly, it is assigned for error that, in computing the amount due upon the coupons described in the declaration, the court allowed seven per cent interest, the legal rate in New York, where the coupons were payable, instead of six per cent, the legal rate in Illinois, where they were made. There was no error in this. The coupons, after their maturity, bore interest at the rate fixed by the law of the place where they were payable. *Gelpcke* v. *City of Dubuque*, 1 Wall. 175. What we have said covers all the assignments of error. We find no error in the record.

Judgment affirmed.

MYERS v. SWANN.

The Circuit Court cannot take jurisdiction of a suit removed from a State court under the third subdivision of sect. 639 of the Revised Statutes, on account of "prejudice or local influence," unless all the necessary parties on one side of the suit are citizens of different States from those on the other.

ERROR to the Circuit Court of the United States for the Eastern District of North Carolina.

The case is stated in the opinion of the court.

Mr. Thomas T. Crittenden and *Mr. Franklin H. Mackey* for the plaintiff in error.

Mr. Samuel F. Phillips for the defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is a writ of error brought under the act of March 3, 1875, c. 137, to reverse an order of the Circuit Court remanding a cause removed from a State court under the third subdivision of sect. 639 of the Revised Statutes, on account of "prejudice or local influence." At the time the application for removal was made in the State court, the suit was being

prosecuted by citizens of North Carolina, as plaintiffs, against George Myers, then in life, a citizen of New York, and certain other persons, all citizens of North Carolina, to recover the possession of a lot in Wilmington, occupied by Myers, and to obtain a conveyance of the legal title held by the other defendants. The suit was originally begun on the 19th of May, 1873, against Myers alone, to recover the possession and damages for the detention; but on the 29th of May, 1877, an amended complaint was filed, not changing the action as against him, but bringing in the other defendants, who, it was alleged, held the legal title, and asking for a conveyance from them. Myers alone answered the amended complaint on the 8th of September, 1877, and on the 12th of March, 1878, petitioned for a removal, filing an affidavit to the effect that he had reason to believe, and did believe, that from prejudice or local influence he would not be able to obtain justice in the State court. The State court of original jurisdiction refused to allow a removal; but on appeal to the Supreme Court this was overruled, on the ground that the new defendants were merely nominal parties as trustees, and thereupon the cause was docketed in the Circuit Court of the United States on the 18th of November, 1878. In November, 1879, the Circuit Court, "being of opinion that the action in its present form" could not be maintained in that court, remanded the suit to the State court, and from that order this writ of error was brought.

As the suit was pending in the State court against Myers from 1873 to 1878, his application for removal was too late to secure the benefit of the separable controversy provision in the act of 1875. Such an application should have been made at or before the term at which the cause could be first tried, or rather, as this suit was begun before the act of 1875 was passed, it should have been at or before the term at which the cause could be first tried after that act went into operation. *Removal Cases*, 100 U. S. 457, 473.

Under the local prejudice act there can be no removal unless all the necessary parties on one side of the suit are citizens of different States from those on the other. This was decided in *Vannevar* v. *Bryant*, 21 Wall. 41. It is not enough that there be a separable controversy between parties having the

necessary citizenship, nor that the principal controversy is between citizens of different States. If there are necessary parties on one side of the suit, citizens of the same State with those on the other, the Circuit Court cannot take jurisdiction.

There is no doubt that in this case the principal controversy is between Myers and the plaintiffs, but the relief that is asked cannot be granted without the presence of all the defendants. The possession of the land is in Myers or his heirs, but the legal title is thought to be in the other defendants. It is true that the other defendants are mere trustees, who may be compelled to convey if they do have the title; but one of the objects of the suit is to get such a conveyance. This part of the relief asked for cannot be had unless the trustee defendants are parties. The record shows that they refused to join as plaintiffs. This implies that they deny the trust and leave the plaintiffs to their remedies. In effect they have put themselves on the record as contending that the conveyance made by their ancestor passed the title to Myers and discharged the trust. This also is claimed by Myers. Consequently it appears that, under the ruling in *Gardner* v. *Brown*, 21 Wall. 36, the plaintiffs required the presence of the trustee defendants in order to get Myers out of possession even. Without the legal title they could not recover in ejectment against him. The trustee defendants were unwilling to join with the plaintiffs. Therefore the plaintiffs had to make them defendants in order to recover at all. It follows that the trustee defendants were not only not nominal parties, but, if they actually did hold the legal title, as is assumed, necessary parties.

The order remanding the cause was right, and it is

Affirmed.

QUINCY v. COOKE.

The General Assembly of Illinois enacted, March 27, 1869, a statute as follows: "The acts of the city council of the city of Quincy, from June 2, 1868, to August 28, 1868, in ordering an election on the proposition to subscribe $100,000 to the capital stock of the Mississippi and Missouri River Air Line Railroad Company, and the subscription of said stock, and all other acts of said council in connection therewith, are hereby legalized and confirmed." In conformity with the vote of the citizens of Quincy cast at such an election, the council had, by an ordinance of Aug. 7, 1868, subscribed for that amount of said capital stock; but neither the election nor the subscription was authorized by law. After the statute took effect, negotiable coupon bonds were, by virtue of it and the ordinance, issued in the sum of $100,000 to the company by the city, and the latter received therefor an equal amount of said stock. In a suit by A., a *bona fide* holder of coupons detached from the bonds, — *Held*, that they are valid obligations of the city.

ERROR to the Circuit Court of the United States for the Southern District of Illinois.

The case is stated in the opinion of the court.

Mr. Carl E. Epler for the plaintiff in error.

Mr. James Grant, *Mr. Whit. M. Grant*, and *Mr. William McFadon* for the defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

On the seventh day of August, 1868, the city council of Quincy, Illinois, — in conformity with a vote of the people at an election held under the authority of a resolution adopted by that body on the ninth day of June previous, — passed an ordinance empowering and directing the mayor to subscribe $100,000, payable in city bonds, to the capital stock of the Mississippi and Missouri River Air Line Railroad Company, a corporation created under the laws of Missouri. The object of the subscription was to aid in the construction of a railroad (lying wholly within the State of Missouri) from West Quincy northwesterly, connecting Quincy with the road of that company. The ordinance made it a condition of the issue and payment of the bonds that there should be expended the sum of $50,000 "in grading, bridging, and tieing the road," commencing at West Quincy, for a distance of twenty-five miles; further, that due guarantees be given, before the bonds were

issued, that their proceeds should be so expended, — "the city council of Quincy to determine on the compliance with said conditions and issue of bonds in payment of the subscription."

On the succeeding day, the city, by its mayor, made the subscription upon the required conditions.

The General Assembly of Illinois passed, March 27, 1869, a statute declaring "that the acts of the city council of the city of Quincy, from June 2, 1868, to Aug. 28, 1868, in ordering an election on the proposition to subscribe $100,000 to the capital stock of the Mississippi and Missouri River Air Line Railroad Company, and the subscription of said stock, and all other acts of said council in connection therewith, are hereby legalized and confirmed." 3 Pri. Laws Ill., 1869, p. 376.

On the 1st of January, 1870, the city council issued to the company, in part payment of said subscription, fifty bonds of the city, of $500 each, numbered from one to fifty, inclusive; and, on May 18, 1870, in further payment, seventy-five additional bonds, numbered from fifty-one to one hundred and twenty-five, inclusive. The remainder, dated July 1, 1870, were issued on Nov. 12, 1870, in further and full payment. Upon each delivery of bonds the city received in exchange an equal amount at par value of the stock of the railroad company. The bonds, negotiable in form, were made payable to the railroad company or bearer at the National Bank of Commerce in New York. They purport to have been issued under and by virtue of the ordinance of Aug. 7, 1868, and of the said act of assembly. The present action was brought to recover the amount of certain coupons of the bonds so issued.

The special finding shows that all of the coupons sued on, except one, were of the bonds issued and delivered Jan. 1 and May 18, 1870; that the bonds from which the coupons sued on were taken, with all their coupons, were purchased by plaintiff for value, before maturity, in open market, in the usual course of business, and without notice of any infirmity therein; that the railroad company, from the commencement of the construction of its road, owned and ran its trains from West Quincy into and out of Quincy over the bridge connecting those two places; that the city, for six years after issuing the bonds, paid the successive annual instalments of interest,

and by an agent, regularly appointed for that purpose, voted its stock at one or more meetings of stockholders held after July 2, 1870.

It is not necessary to consider separately the various questions of law upon which there occurred, at the trial, a difference of opinion between the judges. They are all more or less involved in the general inquiry as to the existence of legislative authority for this issue of bonds.

1. Such authority cannot be found in the original charter of the city or in the act of Feb. 16, 1857. The former gives the city council power "to appropriate money and provide for the payment of the debt and expenses" of the city; the latter authorized that body "to issue city bonds to any amount not exceeding, at one time, in the aggregate, the sum of $75,000." These provisions manifestly relate to debts and expenses incurred for ordinary municipal purposes, and not to railroad subscriptions, the authority to make which must be expressly conferred by statute. These bonds upon their face show that they were executed in payment of a subscription of the latter character, and, consequently, purchasers were charged with notice that they were not issued for ordinary municipal purposes under any power conferred by the charter of the city or by the act of 1857.

2. The question of legislative authority is not determinable by that provision of the Illinois Constitution of 1870 which — saving municipal subscriptions made under existing laws by a popular vote prior to its adoption — declares that "no county, city, town, township, or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of, such corporation: *Provided, however*, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions when the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption." This is quite clear in view of sect. 24 of the schedule of that Constitution, which provides: "Nothing contained in this Constitution shall be so construed as to deprive the General Assembly of the power to authorize the city of Quincy to create any indebtedness

for railroad or municipal purposes, for which the people of said city shall have voted, and to which they shall have given, by such vote, their assent, prior to the thirteenth day of December, in the year of our Lord one thousand eight hundred and sixty-nine: *Provided*, that no such indebtedness so created shall, in any part thereof, be paid by the State, or from any State revenue, tax, or fund, but the same shall be paid, if at all, by the said city of Quincy alone, and by taxes to be levied upon the taxable property thereof: *And provided further*, that the General Assembly shall have no power in the premises that it could not exercise under the present Constitution of this State."

The Supreme Court of Illinois, in *Q. M. & P. R. R. Co.* v. *Morris*, 84 Ill. 410, had occasion to consider the scope and effect of that section. In that case an election was held Aug. 7, 1869, under the authority of a resolution of the city council, to take the sense of the people upon a subscription to the capital stock of the Quincy, Missouri, and Pacific Railroad Company, also a Missouri corporation, whose road lay wholly within that State. That election was held without any law authorizing a vote on the question, or empowering the city to become a stockholder in that company. But by an act passed July 1, 1871, after the Constitution of 1870 went into operation, the city of Quincy — subject to the terms and requirements embodied in the proposition submitted to the people — was authorized to make, upon such conditions as the city council deemed best, a subscription to the stock of that company, for which the people may have voted prior to the thirteenth day of December, 1869. The act further provided: "Any election held in said city prior to said day, for the purpose of such vote being taken, and any contract or subscription made, or to be made, by said city to the capital stock of said railroad company in pursuance thereof, and any bonds or other evidences of such indebtedness issued or to be issued by said city, are hereby declared valid." Under that act the subscription was made and bonds issued; and the controlling question was as to their validity. The court — waiving any expression of opinion as to the validity of that part of the act which in terms purported to legalize the election — decided: That the obvious effect and intent of the twenty-fourth section of the

schedule of the Constitution were to leave the action of the city of Quincy, in assuming, by vote prior to Dec. 13, 1869, to create indebtedness for a railroad subscription, and the power of the legislature over it, "unaffected by the Constitution of 1870; in other words, to leave the vote and the power of the legislature to confer the right to take stock precisely as they would have been under the Constitution of 1848;" that the city council were the corporate authorities of Quincy, upon whom, within the meaning of the Constitution of 1848, the legislature could confer, without the intervention of a popular vote, authority to make the subscription and issue the bonds; that sect. 24 of that schedule embraced a vote taken without authority of law, prior to Dec. 13, 1869, because, had the vote been legal, the language, "for which the people of said city shall have voted, and to which they shall have given, by such vote, their assent," would have been unnecessary in view of the proviso in the general section forbidding municipal subscriptions in aid of railroad corporations; lastly, that the construction of the Quincy, Missouri, and Pacific Railroad, although no part of it lay in Illinois, was a corporate purpose of the city of Quincy, because thereby its trade and commerce were increased, its property enhanced in value, and its welfare promoted.

3. It remains to inquire as to the authority of the city, under the Constitution of 1848, to issue the bonds in question. Its power to do so is denied upon these principal grounds: 1. That the election held under the sanction of the city council, and the action of that body in directing the subscription to be made, were of no legal effect, since the election was held without authority of law, and the subscription was made when there was no legislative authority to create such indebtedness. 2. That without such authority no subscription could be legally made. 3. That the curative act of March 27, 1869, was invalid, because it assumed to impose indebtedness upon the city without the consent of its corporate authorities. The soundness of the first and second of these propositions cannot be disputed, whether reference be had to the decisions of this court or to those of the Supreme Court of Illinois.

But we are unable to concur in the suggestion that the corporate authorities of Quincy did not, after the passage of the

act of March 27, 1869, have authority to issue these bonds. In support of the position taken by the city, counsel refer to numerous decisions of the Supreme Court of Illinois construing the fifth section of the ninth article of the Constitution of 1848, which provides that "the corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes." From those decisions the following propositions, among others, may be deduced: That the clause was intended to define as well the class of municipal officers upon whom the power of taxation, for local purposes, might be conferred, as the purposes for which such power could be constitutionally exercised; that by the phrase "corporate authorities" must be understood those municipal officers who were selected with some reference to the creation of municipal indebtedness, and who were either directly elected by the population to be taxed, or appointed in some mode to which they have given their assent; that the construction of a railroad, at least one within or near a county, township, town, village, or city, was a corporate purpose of such municipality; and that a debt for a subscription to the stock of a railroad corporation, or for bonds in payment thereof, could not be imposed upon a municipal corporation without the consent or against the will of its corporate authorities. But it has been quite as distinctly ruled by the Supreme Court of Illinois, that the city council, and not the voters, of an incorporated city were its corporate authorities within the meaning of the Constitution of 1848, and, if empowered by legislative enactment, could, under that instrument, subscribe to the stock of a railroad corporation, and issue bonds in payment thereof, without submitting the matter to popular vote. Such was the decision in *Q. M. & P. R. R. Co.* v. *Morris*, where the court reaffirmed the ruling upon this point in *Keithsburg* v. *Frick*, 34 Ill. 405, 421. In the latter case, a subscription made by a town to the capital stock of a railroad corporation — without authority of law, as was alleged — was, by an act passed after the town was incorporated under a special charter, declared to be legal, and bonds authorized to be issued therefor. The court said: "It is by no means a necessary element in these subscriptions that there

should be a vote of the inhabitants of the town or city authorizing them. It is competent for the legislature to bestow the power directly on the corporation without any intermediary, as they did in this case." In *Marshall* v. *Silliman*, 61 Ill. 218, 225, the right of the legislature to grant such an authority to the trustees of an incorporated town was conceded. And in *Williams* v. *Town of Roberts*, 88 id. 11, 21, the court, speaking by Scholfield, C. J., said: "County boards, such as boards of supervisors, county commissioners, &c., and the municipal authorities of incorporated cities, towns, and villages, may, when empowered so to do by proper legislation, subscribe for the capital stock of railroad corporations without first submitting the question to the electors of the municipality. They are elected as representatives of the electors, and theoretically, in appropriate cases, their acts are the acts of those they represent. Hence it has been held, where a vote of the electors has been required as a precedent condition to the making of a subscription for stock in a railroad company, and the law prescribing the mode of calling and holding the election has not been observed, inasmuch as the legislature might have empowered the municipal authorities to make the subscription without first submitting the question to the electors, it may, by a subsequent enactment, declare the noncompliance with the law in the holding of the election of no consequence, and validate the subscription, — in other words, validate the subscription without reference to the election. This, however, it will be observed, is upon the theory that power to make the subscription does not in any degree necessarily depend upon a vote of the electors of the municipality upon that question, but solely upon the will of the legislature."

The authorities to which we have referred sustain the judgment against the city. This case is clearly distinguishable from those in which the legislature has attempted to impose upon a municipal corporation, without the consent of its corporate authorities, an indebtedness for subscription to the capital stock of a railroad corporation.

The cases mainly relied on by counsel for the city are those in which certain officers of limited authority were, in terms or in effect, required by legislative enactment to issue bonds or incur indebtedness in the name of a municipality, without the

consent, expressed in legal form, of those who were, in the constitutional sense, its corporate authorities. Here there can be no question but that the city council are the corporate authorities of Quincy. And there is no ground whatever upon which to rest the suggestion that the indebtedness was created without their consent. In no just sense were they compelled to issue bonds in exchange for stock in the railroad company. If, as claimed by the city, the act of March 27, 1869, was inoperative in so far as it assumed to legalize and confirm what had been previously done without the sanction of law, nevertheless by that act it was intended to confer upon the city council power, in execution of the expressed will of the voters, to issue bonds to the amount of $100,000 for stock in this railroad company. The vote of the electors, we have seen, was not essential to the validity of bonds issued, under legislative sanction, by the corporate authorities of the city. The city council was not required or directed, but only empowered to proceed as if they had been originally invested with authority to make the subscription. The legislature, in substance, declared, as it might constitutionally have done, that the corporate authorities of the city had its consent to issue bonds to be exchanged for stock in the railroad company. If the corporate authorities could have been compelled by legal proceedings to issue the bonds, that is only another form of saying that the curative act was constitutional, and, consequently, that the bonds are valid. If, however, they could not have been so compelled, then the execution and delivery of the bonds, under the authority of the act of March 27, 1869, was a voluntary creation of indebtedness for a corporate purpose by the corporate authorities of the city.

What has been said disposes of all the questions certified, including that one relating to the coupon of a bond delivered to the railroad company after the Constitution of 1870 went into effect. In *Q. M. & P. R. R. Co.* v. *Morris* all the bonds there involved were executed and issued under an act passed in 1871. They were sustained upon the ground that the validity of that act depended upon the power which the legislature possessed under the Constitution of 1848. That decision, it would seem, determines the present case as to the coupon of the bond delivered in November, 1870.

Judgment affirmed.

MILLS COUNTY *v.* RAILROAD COMPANIES.

1. The swamp and overflowed lands granted by the act of Sept. 28, 1850, c. 84, are subject to the disposal of the States wherein they respectively lie, and no party other than the United States can question such disposal or enforce the conditions of the grant.
2. The proviso to the second section of the act, that the proceeds of the lands shall be applied exclusively, as far as necessary, to the purpose of reclaiming the same by levees and drains, imposed an obligation which rests upon the good faith of the States. No trust was thereby attached to the lands, and the title to them, which is derived from either of the States, is not affected by the manner in which she performed that obligation.
3. The State of Iowa having granted its swamp and overflowed lands to the counties respectively in which they are situate, Mills County, insisting that certain lands were of this character, made claim thereto. The Burlington and Missouri River Railroad Company claimed them under the act of May 15, 1856, c. 28. These conflicting claims gave rise to a suit between the parties, which was decided by the State courts in favor of the county. A writ of error was thereupon brought; and, whilst it was pending here, a compromise was entered into by which the county was to make certain conveyances to the company, and to pay it the sum of $10,000 for lands previously disposed of. Conveyances were executed accordingly. Afterwards, the county instituted suit to have the compromise declared void, and the company sued for the $10,000. The State courts having sustained the compromise, and decided against the county in both suits, writs of error were brought here. *Held*, 1. That the county cannot set up that the lands were disposed of contrary to the provisions of the said act of 1850. 2. That although, after the compromise was made, the writ then pending was submitted to this court, and decided in favor of the county, yet that this did not abrogate the compromise, as the parties continued to act under it; and that the decision of the State court in the present cases is not repugnant to, nor in disaffirmance of, the opinion and judgment of this court.

ERROR to the Supreme Court of the State of Iowa.

The case is stated in the opinion of the court.

Mr. Charles B. Lawrence and *Mr. D. H. Solomon* for the plaintiff in error.

Mr. Samuel Shellabarger and *Mr. Jeremiah M. Wilson* for the defendant in error.

MR. JUSTICE BRADLEY delivered the opinion of the court.

These cases were consolidated and heard together in the State courts, both relating to the same subject-matter; viz., the

validity of a compromise agreement made on the 27th of October, 1868, between Mills County, in the State of Iowa, and the Burlington and Missouri River Railroad Company, in reference to certain lands lying in said county, claimed by the county as swamp and overflowed lands, and claimed by the railroad company as railroad-grant lands. The claim of the county was based on the act of Congress of Sept. 28, 1850, c. 84, entitled "An Act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits;" and an act of the General Assembly of the State of Iowa, entitled "An Act to dispose of the swamp and overflowed lands in the State of Iowa, and to pay the expenses of selecting and surveying the same," approved Jan. 13, 1858; and other acts of the General Assembly of said State. The claim of the railroad company was based upon the act of Congress of May 15, 1856, c. 28, granting to the State of Iowa certain lands for the purpose of aiding the building of a railroad from Burlington, Iowa, to a point on the Missouri River at or near the mouth of Platte River in Nebraska.

The act of Congress first referred to declares, in effect, that to enable the State of Iowa to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of the act, shall be, and the same are hereby, granted to said State.

And, after providing for listing and patenting the lands, it was, by sect. 2, enacted that the fee-simple to said lands shall vest in the State of Iowa, subject to the disposal of the legislature thereof: "*Provided, however*, that the proceeds of said lands, whether from sale or direct appropriation in kind, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands, by means of the levees and drains aforesaid."

The General Assembly of Iowa, by an act passed Jan. 13, 1853, declared "that all swamp and overflowed lands granted to the State of Iowa by the act of Congress (September 28, 1850) be, and the same are hereby, granted to the counties

respectively in which the same may lie or be situated, for the purpose of constructing the necessary levees and drains to reclaim the same; and the balance of said lands, if any there be, after the same are reclaimed as aforesaid, shall be applied to the building of roads and bridges, when necessary, through or across said lands, and if not needed for this purpose, to be expended in building roads and bridges within the county."

On the 22d of March, 1858, the General Assembly passed another act, containing, amongst others, the following provisions:—

1. "*Be it enacted by the General Assembly of the State of Iowa*, That it shall be competent and lawful for the counties owning swamp and overflowed lands to devote the same, or the proceeds thereof, either in whole or in part, to the erection of public buildings for the purpose of education, the building of bridges, roads, and highways; for building institutions of learning, or for making railroads through the county or counties to whom such lands belong: *Provided*, that before any of said land, or the proceeds thereof, shall be so devoted to any of the purposes aforesaid, the question whether the same shall be so done shall be submitted, at some general or special election, to the people of the county.

2. "The proper officer or officers of any county may contract with any person or company for the transfer and conveyance of said swamp or overflowed lands, or the proceeds thereof, or otherwise appropriate the same to such person or company, or to their use, for the purpose of aiding or carrying out any of the objects mentioned in the first section of this act, which said contract shall be reduced to writing and signed by the respective parties or their lawful authorized agents."

Another section prescribed the mode in which elections should be called and held, and without which any contract should be void, and concluded with the following proviso: "*Provided*, that no sale, contract, or other disposition of said swamp or overflowed lands shall be valid, unless the person or company to whom the same are sold, contracted, or otherwise disposed of, shall take the same subject to all the provisions of the acts of Congress of September 28, 1850, and shall expressly release the State of Iowa and the county in which the lands are situated, from all liability for reclaiming said land."

The Burlington and Missouri River Railroad Company was incorporated under the laws of the State of Iowa, Jan. 23, 1852, for the purpose of constructing a railroad from Burlington to the most eligible point on the Missouri River. The act of Congress of May 15, 1856, c. 28, under which the company claimed the lands, granted to the State of Iowa, for the purpose of aiding in the construction of railroads "from Burlington, on the Mississippi River, to a point on the Missouri River, near the mouth of the Platte River," &c., "every alternate section of land, designated by odd numbers, for six sections in width on each side of said roads;" but it was provided that if any sections should be sold, or become subject to pre-emption, before the lines of the roads should be definitely fixed, other lands might be selected in lieu thereof, nearest to the tiers designated, but not to exceed fifteen miles from the lines of the roads. It was further provided, that the lands thus granted to the State should be subject to the disposal of the legislature thereof, for the purpose aforesaid, and no other.

The General Assembly of Iowa, by an act dated June 3, 1856, accepted this grant, and enacted (sect. 2) "that so much of the lands, interest, rights, powers, and privileges as are or may be granted and conferred, in pursuance of the act of Congress aforesaid, to aid in the construction of a railroad from Burlington, on the Mississippi River, to a point on the Missouri, near the mouth of Platte River, are hereby disposed of, granted, and conferred upon the Burlington and Missouri River Railroad Company, a body corporate, created and existing under the laws of the State of Iowa."

The acts and clauses of acts referred to are sufficient to show the general nature of the litigation which sprang up between the parties now before the court.

The railroad company having claimed the right to appropriate certain of the lands in Mills County, which the county authorities claimed to be swamp and overflowed lands, the county, in December, 1863, commenced a suit in chancery against the railroad company to establish its title to the lands in question between them. The county court and the Supreme Court of the State decided in favor of the county, and

the railroad company brought the case to this court by writ of error, where it was pending when the compromise agreement in question was entered into. That agreement consisted of a proposition made by the county authorities to the railroad company, which was accepted by the latter. The following is a copy of the papers which passed between them: —

Proposition of the County.

"In order to settle and finally adjust the lawsuit now pending in the Supreme Court of the United States, wherein Mills County, in the State of Iowa, is plaintiff, and the Burlington and Missouri River Railroad Company is defendant, and secure the completion of said road through Mills County, *via* Glenwood, in said county, we, the undersigned, agents of said county, submit the following proposition to the board of directors of said railroad company, to wit: —

"There are in dispute between the parties to the said lawsuit twenty-three thousand three hundred and sixteen acres. For the purpose of having our proposition understood, we acknowledge that we owe you acres of land to the amount of 23,316; to pay which we have and offer you odd sections, vacant (most of which is a part of the 23,316 acres), and even sections patented to the county and unsold, in the aggregate 9,080 acres; balance of the land due you, 14,236 acres. For further payment we have and offer to you of the odd sections (about all of which is of the 23,316 claimed by you), subject to pre-emption made through the county, acres to the amount of (on which nothing has been paid to the county) 4,660. Of these pre-empted lands we estimate that about one-half of the pre-emptions are fraudulent, and ought not to be recognized, but the county must ask that where *bona fide* improvements have been made on the same, the pre-emptors must be secured in their right to the same, and have the privilege of purchasing at $1.25 per acre of the county or company, which amount shall, in any event, go to the railroad company. Now you will have land for land, subject only to the pre-emptor's claims, until there will be due you in acres 9,576.

"The remainder, 9,576 acres, belong to *bona fide* settlers and purchasers, who, we must insist, shall be protected by the county. And as we have paid you all the land we have, we offer you for this balance ten thousand dollars in money.

"The company should understand that the balance of 9,576 acres

is the land, portions of which it has been settling with our individual citizens for, and there is included in the 9,576 acres all the lands the company has sold to citizen settlers at $1.25 per acre. With this understanding, the $10,000 balance we offer you will be just as much less than 9,576 acres as the company has thus sold, and, therefore, our pay would perhaps amount to $1.50 or more.

"It is understood that the said suit now pending shall be continued, by agreement of the parties, from term to term, until the conditions of this contract or proposition shall be complied with.

"It is also further understood that the foregoing proposition shall not be binding on the county of Mills, unless said railroad company shall complete said railroad through Mills County *via* Glenwood and build a depot at Glenwood, in said county, and in case said railroad company shall fail or neglect to build said railroad through Mills County *via* Glenwood, and also to build and establish a depot at Glenwood, in said county, then, and in that event, the said lawsuit shall stand for final hearing in the Supreme Court of the United States, the same as if this proposition had never been made. In case the suit shall be settled on the basis of this proposition, each party shall pay their own costs. The manner of transferring the land, whether the county shall deal with the purchasers and preemptors, or whether the railroad company under the restrictions indicated, the county is not particular about, but will agree to what may seem most practicable.

"The amount in acres, as stated above, may not be exactly correct, and probably is not, but it is believed to be nearly so; but we wish it understood that the company shall have all the swamp lands the county now hold or are entitled to in Mills County, Iowa, subject only to the conditions indicated in the foregoing. Witness our hands this July 13, 1868. (Signed) Wm. Hale; E. C. Bosbyshell; D. H. Solomon; L. W. Tubbs: majority of the committee."

Acceptance.

"BURLINGTON, IOWA, October 27, 1868.

"This proposition is hereby accepted, and the terms and stipulations and conditions are agreed to by the Burlington and Missouri River Railroad Company. (Signed) Burlington and Missouri River Railroad Company: By C. E. Perkins, Supt."

This proposition and acceptance being reported by the committee to the board of supervisors of Mills County, the said board passed the following resolution: —

"After giving the report due consideration, it is resolved by the board of supervisors of Mills County, Iowa, at their regular session in November, 1868, that the proposition submitted to the Burlington and Missouri River Railroad Co., by our special railroad committee, and the acceptance of the same by the said company be, and the same is hereby, confirmed and ratified, and that the same be spread upon the records of this board.

"The ayes and nays being called for, the vote stands as follows: —

"Ayes — Allis, Forrester, Haynie, Lamb, Utterback, Wing, Ward, Russell, Summers, and Mr. Chairman. Nays — None."

Several deeds of conveyance were executed by the board of supervisors of Mills County to the company in the years 1869, 1870, and 1871, in pursuance of this compromise agreement, conveying altogether 13,720$\frac{55}{100}$ acres of land.

The suit of Mills County (one of the consolidated suits now before us) was brought in January, 1874, against that company, and others, in the Mills County District Court, by petition seeking to have the said compromise agreement and the said deeds of conveyance declared void, on the ground that the said agreement was not authorized by a vote of the people of the county, but was obtained by fraud; that it involved a diversion of a trust fund, and a surrender by agents of the whole subject-matter in controversy in a suit of their principal; that the judgment of the Supreme Court of Iowa, in the original suit, was duly affirmed by this court in February, 1870; and that, at an election held in October, 1871, for affirming or disaffirming said agreement, the people of Mills County disaffirmed the same by a vote of 1,031 against 357.

The suit of the Chicago, Burlington, and Quincy Railroad Company (successor to the Burlington and Missouri River Railroad Company) against Mills County (the other of the consolidated suits now before us), was brought in May, 1875, to recover the sum of $10,000, which by the said compromise agreement was to be paid by Mills County to the Burlington and Missouri River Railroad Company; and as the answer of the county set up the matters alleged in the petition in the other suit, the two suits were consolidated.

The Mills County District Court decided against the county

in both suits, and the Supreme Court of Iowa affirmed the decrees of the District Court. The decrees of the Supreme Court are brought here for review upon the allegation that they are repugnant to the laws and authority of the United States.

The principal Federal question which arises in these cases is, whether the compromise agreement made between Mills County and the Burlington and Missouri River Railroad Company was in violation of the act of Congress by which the swamp and overflowed lands in the State of Iowa were granted to that State. It is alleged that this grant was made for a special purpose, and upon express trust; viz., to be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of levees and drains, as declared in the act of 1850. It is not our province, on these writs of error, to inquire whether the compromise in question was or was not in violation of the State laws. That question was for the State court to determine; and it has been determined in the negative. Nor is it our province to inquire whether any fraud or excess of authority was committed by the agents of the county in making the compromise. That was also a question for the State court to determine; and it has been determined in the negative. We are only to inquire whether the State laws themselves, by virtue of which the said transaction was allowed and sanctioned, was such a violation of the act of Congress as to require a reversal of the decrees of the Supreme Court of Iowa.

The statutes in question have already received some consideration at the hands of this court in the cases of *Emigrant Company* v. *County of Wright*, 97 U. S. 339, and *Emigrant Company* v. *County of Adams*, 100 id. 61. Those cases came before us on appeal from the Circuit Court of the United States for the District of Iowa. In both of them, certain contracts for the purchase of swamp and overflowed lands from the county authorities were assailed by charges of fraud, and as not being in conformity with the statutes of Iowa; and those questions were necessarily discussed. It was also contended that the disposition of the lands operated as a diversion of the fund, in violation of the original grant. In the first case, the contract was declared to be void for actual fraud of the grossest char-

acter; and the other questions were not fully considered. In the latter case, this court did not consider the evidence of fraud as sufficient to avoid the purchase; and this rendered it necessary to examine the question of repugnancy between the State laws and the act of Congress with more care. On the first consideration of the case, we were disposed to think that the act of assembly of the State of Iowa passed in 1858, by which the several counties owning swamp and overflowed lands were authorized to devote the lands, or the proceeds thereof, either in whole or in part, to the erection of public buildings for the purpose of education, the building of bridges, roads, and highways, or for building institutions of learning, or for making railroads through the county, was repugnant to the provisions of the act of Congress, as authorizing a diversion of the fund from its proper purposes; and that this repugnancy rendered such dispositions of the lands void. But, on a reconsideration of the subject, we were inclined to modify our first impressions. The following extract from the opinion then delivered will show the final view which we took of the subject: "The argument against the validity of the scheme [namely, that created by the act of 1858] is, that it effects a diversion of the proceeds of the lands from the objects and purposes of the congressional grant. These were declared to be to enable the State to reclaim the lands by means of levees and drains. The proviso of the second section of the act of Congress declared that the proceeds of the lands, whether from sale or direct appropriation in kind, should be applied exclusively, as far as necessary, to these purposes. This language implies that the State was to have full power of disposition of the lands; and only gives direction as to the application of the proceeds, and of this application only 'as far as necessary' to secure the objects specified. It is very questionable whether the security for the application of the proceeds thus pointed out does not rest upon the good faith of the State, and whether the State may not exercise its discretion in that behalf without being liable to be called to account, and without affecting the titles to the lands disposed of. At all events, it would seem that Congress alone has the power to enforce the conditions of the grant, either by a revocation thereof, or other suitable action, in a clear case of viola-

tion of the conditions. And as the application of the proceeds to the named objects is only prescribed 'as far as necessary,' room is left for the exercise by the State of a large discretion as to the extent of the necessity." p. 69.

Upon further consideration of the whole subject, we are convinced that the suggestion then made, that the application of the proceeds of these lands to the purposes of the grant rests upon the good faith of the State, and that the State may exercise its discretion as to the disposal of them, is the only correct view. It is a matter between two sovereign powers, and one which private parties cannot bring into discussion. Swamp and overflowed lands are of little value to the government of the United States, whose principal interest in them is to dispose of them for purposes of revenue; whereas the State governments, being concerned in their settlement and improvement, in the opening up of roads and other public works through them, in the promotion of the public health by systems of drainage and embankment, are far more deeply interested in having the disposal and management of them. For these reasons, it was a wise measure on the part of Congress to cede these lands to the States in which they lay, subject to the disposal of their respective legislatures; and although it is specially provided that the proceeds of such lands shall be applied, "as far as necessary," to their reclamation by means of levees and drains, this is a duty which was imposed upon and assumed by the States alone, when they accepted the grant; and, whether faithfully performed or not, is a question between the United States and the States, and is neither a trust following the lands nor a duty which private parties can enforce as against the State.

We are, therefore, of opinion that the act of Congress cannot be invoked by the county of Mills for the purpose of showing that its provisions have been violated by the State laws, under which alone the county itself can set up any title to the lands, and by virtue of which, as decided by the State court, it has disposed of them for railroad purposes.

But it is contended that the decision of this court, rendered in February, 1870, affirming the decree in the original suit, and adjudging the title of the lands to be in Mills County, and

not in the Burlington and Missouri River Railroad Company, is rendered null and ineffective by the decrees of the Supreme Court of Iowa in these cases, and hence that these decrees are against the right of Mills County as established by authority of the Supreme Court of the United States, and ought for that cause to be reversed. We do not think that this result necessarily follows. The compromise agreement of 1868 was made whilst the writ of error in that original suit was pending in this court, and before the cause was heard. That compromise settled the matters in difference between the parties. There may have been reasons independent of the controversy relating to the particular lands in question in that suit why it was desirable to have the legal questions involved therein settled by the judgment of this court. The county of Mills and the railroad company may have been respectively interested in other lands similarly situated in respect to title as the lands involved in that suit. But if this were not so, the result would only be that the litigation was continued here after the parties had adjusted their rights by agreement, — an improper proceeding, undoubtedly, but one which would not abrogate or render null the agreement itself, unless the parties voluntarily waived and abandoned it. That they did not waive or abandon it is manifest from the fact that deeds of conveyance were executed by the county to the railroad company in pursuance of the compromise agreement after the decision of this court was rendered; namely, one deed dated Sept. 6, 1870, for 3,560 acres, and another deed dated June 19, 1871, for 240 acres.

We are, therefore, of opinion that the decrees made by the Supreme Court of Iowa in these cases do not violate any act of Congress, nor disaffirm the judgment of this court, nor impair any right, title, or immunity which the county of Mills has a right to claim under any authority of the United States. The said decrees must, therefore, be

Affirmed.

READ v. PLATTSMOUTH.

1. Negotiable coupon-bonds were, without authority of law, issued in October, 1872, by a city in Nebraska, for the purpose of raising money wherewith to construct a high-school building within her limits. They were sold, and the proceeds applied accordingly. The legislature, by an act approved Feb. 18, 1878, *infra*, p. 571, legalized the proceedings of the city in the premises. The Constitution of the State then in force declares that "the legislature shall pass no special act conferring corporate powers," and that "no bill shall contain more than one subject, which shall be clearly expressed in its title." A purchaser of the bonds for full value, without notice of any informality in their issue, to whom the city paid the interest thereon for four years, brought suit to recover the amount of the coupons then due and unpaid. *Held*, 1. That as by force of the transaction the city was bound to refund the moneys he paid it in consideration of its void bonds, and as the act, by confirming them, merely recognizes the existence of that obligation, and provides a medium for enforcing it according to the original intention of the parties, no new corporate powers were thereby conferred. 2. That the title of the act is a full and apt description of its contents.
2. Under the second section of the act of Nebraska approved Feb. 25, 1875, *infra*, p. 573, the bonds are valid obligations, and neither it nor the said act of Feb. 18, 1873, is in conflict with the Constitution of the State which was then in force.

ERROR to the Circuit Court of the United States for the District of Nebraska.

Read sought to recover, in an action at law, the amount of certain overdue interest-coupons upon bonds issued by the city of Plattsmouth, dated Oct. 1, 1872. Each bond contains a recital that it "is one of a series of twenty-five of like tenor, date, and amount, issued in pursuance of the orders of the city council of the city of Plattsmouth, in the State of Nebraska, for the construction of a high-school building in said city, authorized by a vote of the legal voters of said city of Plattsmouth, and in compliance with the laws of the State of Nebraska, and for the payment of which the good faith, property, and effects of said city are hereby pledged."

These bonds were issued for the purpose of constructing a high-school building in the city. The city sold them, and applied their proceeds to construct such a building, which is now in actual use by the city; and the city paid interest on the bonds for four years.

On the trial the plaintiff proved that he bought the entire

issue of the bonds for full value, without notice of any informality in their issue. There was no evidence offered in defence, and the court instructed the jury to find a verdict for the defendant. The plaintiff excepted, and for the alleged error in this ruling the judgment rendered upon the verdict in favor of the city is now sought to be reversed.

The judgment rests upon the assumption that the bonds in question are void, and this depends on these two propositions: *First*, that at the time they were issued there was no law which authorized them; and, *second*, that certain acts of the legislature of Nebraska, subsequently passed, purporting to validate them, are themselves void.

The legislation bearing upon the question appears to be as follows: —

The city of Plattsmouth was created, March 14, 1855, a body corporate under that name, by a special act of the legislature of the Territory of Nebraska, with all the powers and attributes of a municipal corporation. The forty-first section is as follows: —

"The council is authorized to borrow money for any object in their discretion, if at a regularly notified meeting, under a notice stating distinctly the nature and object of the loan, and the amount thereof as nearly as practicable, the voters of the city may determine in favor of the loan by a majority of two-thirds of the legal voters at the said election, and the said loan can in no case be diverted from the specified object."

The legislature, in 1867, also passed "An Act to authorize the common council of the city of Plattsmouth to raise money to erect a central or high-school building, and for other purposes."

So much of the act as is material here is contained in the following: —

"SECT. 1. *Be it enacted by the council and house of representatives of the Territory of Nebraska*, That the mayor and common council of the city of Plattsmouth shall, by virtue of their office, be commissioners of the school-house fund in and for said city, and the common council shall perform all the duties of such commissioners, and shall possess all the rights, powers, and authority, and be subject to the same restraints of township boards of education, for the purpose of raising money required for erecting, purchasing, and

leasing school-houses and procuring sites therefor, and the fitting up and furnishing thereof.

"SECT. 4. All common, graded, and central schools organized within the city of Plattsmouth shall be public and free to all children residing within the city. And the common council, by a vote of the majority of all the council elected, are hereby authorized to include in the general annual city tax-list such additional sum as in their opinion, with the public school moneys for the year, will be sufficient to support the school system of said city.

"SECT. 5. The common council shall have power and it shall be the duty, —

"*First*, To designate and purchase or lease in said city all necessary sites for school-houses therein, and to improve and fence the same, as to them shall appear suitable and proper.

"*Third*, To make such by-laws and regulations as they may deem necessary for the proper security and preservation of the school-houses and other property owned by the city for school purposes.

"SECT. 7. The mayor and common council are hereby authorized and directed to raise by loan, in anticipation of the taxes, when deemed necessary, moneys not exceeding in the aggregate $15,000, required for erecting, purchasing, or leasing school-houses and procuring sites therefor.

"SECT. 8. That for the purpose of effecting such loan, the mayor and common council are authorized to issue the bonds of said city, under the seal of the said city, to the amount of $15,000, and no more, and bearing interest at a rate not exceeding ten per centum per annum, redeemable in one, two, three, four, five, and six years.

"SECT. 17. The title of all school-houses, sites, lots, furniture, and all other school property, shall be vested in the city of Plattsmouth.

"SECT. 20. The general school laws of this Territory in force at the time of the passage of this act shall, so far as the same are applicable, be taken and construed as part of this act." Territorial Laws of 1867, p. 38.

The Constitution of Nebraska, which took effect March 1, 1867, soon after the passage of the foregoing act, provided, in art. 1, sect. 16, that "it shall be the duty of the legislature to pass suitable laws to encourage schools and the means of instruction." Sect. 1, art. 8, declared that "the legislature shall pass no special act conferring corporate powers;" and sect. 4

of the same article, that "the legislature shall provide for the organization of cities and incorporated villages by general laws," &c.

Immediately after the admission of the State into the Union the legislature made a revision of its general school laws, and provided, in sect. 60 of the act, that "nothing in this act shall be construed so as to interfere with or abrogate any of the rights, privileges, and immunities, duties or liabilities, conferred or prescribed by special enactment for any school district comprised within any incorporated city." Laws of the State of Nebraska, 1867, pp. 102, 110.

And accordingly the provisions of the special school law of 1867 were continued in force, and were in substance re-enacted in the act of Feb. 18, 1873, "to regulate the public schools of Plattsmouth City and provide means for their support."

The same authority to borrow money and to issue bonds therefor, for school and school-house purposes, and subject to the same limitations, is conferred by this act as that contained in the original statute restricting the amount to $15,000.

The original charter of the city of Plattsmouth was superseded under the Constitution by a general law organizing municipal corporations, under which Plattsmouth became a city of the second class. Laws of Nebraska of 1871, p. 26. This act, passed March 1, 1871, authorized the city "to borrow money on the credit of the city, and pledge the credit, revenue, and public property of the city for the payment thereof," without any limit as to amount, where the city council was instructed to do so by a majority of all the votes cast at an election held in such city for that purpose. Gen. Stats. Nebraska, 1873, p. 148.

After the issue of the bonds in suit, the legislature of Nebraska passed the following act, which was approved Feb. 18, 1873: —

"AN ACT *to legalize the proceedings of the city council of the city of Plattsmouth, in reference to the construction of a high-school building, and to authorize the city council to complete the same.*

"WHEREAS, At a session of the city council of the city of Plattsmouth, county of Cass, and State of Nebraska, held on the first day

of July, A. D. 1872, the proposition of issuing the bonds of said city to the amount of $25,000, for the purpose of erecting a high-school building, was submitted to the voters of said city; and

"Whereas, At a special election held in said city, for the purpose of voting on said proposition, on the twenty-second day of July, 1872, a majority of the votes cast were in favor of issuing said bonds; and

"Whereas, In pursuance of said submission and vote, the city council of said city of Plattsmouth have issued and sold said bonds, and with the proceeds thereof have proceeded to let the contract for the construction and completion of said house, and have appointed C. F. Driscoll and M. L. White superintendents of the construction of the same, and the work on said building has commenced; therefore,

"*Be it enacted by the legislature of the State of Nebraska:*

"SECT. 1. That all acts and proceedings of the city council of said city of Plattsmouth, in relation to issuing said bonds and letting the contract for the construction of said high-school building, and the appointment of said C. F. Driscoll and M. L. White to superintend the construction of the same, and all matters and proceedings connected therewith which may in any way affect the validity of said bonds, or of the contract for the construction of the said school-house, be and the same are hereby legalized, confirmed, and made valid in law.

"SECT. 2. *And be it further enacted*, That the city council of the said city of Plattsmouth are hereby authorized and empowered to proceed with the construction of said high-school building until its completion; and for that purpose shall have full and exclusive control of all funds realized from the sale of bonds issued by the said city of Plattsmouth for that purpose.

"SECT. 3. All funds now in the hands of the said city treasurer of the said city of Plattsmouth which have been created by the sale of the high-school bonds of the said city shall be applied to the erection of said high-school building, and shall not be appropriated or diverted to other use or purpose whatever.

"SECT. 4. *And be it further enacted*, That the right and title of the said city of Plattsmouth in and to block number twenty-four in said city, which has heretofore been platted and designated on the recorded plat of said city as a park, and dedicated to public use, and on which the said school-house is being erected, shall vest and remain in the said city of Plattsmouth for school purposes, and the same shall be held exclusively for said purpose.

"SECT. 5. This act shall take effect and be in force from and after its passage." Session Laws, 1873, p. 72.

The legislature passed another statute, approved Feb. 25, 1875, entitled "An Act to amend an act to incorporate cities of the second class and to define their powers, approved March 1, 1871, and to legalize certain taxes therein mentioned."

The text of the act is as follows: —

"*Be it enacted by the legislature of the State of Nebraska:*

"SECT. 1. That no tax heretofore levied in any city of the second class shall be held to be invalid, illegal, or irregular because the same was not levied within the time prescribed by the law in force when the same was so levied; nor on account of any mere irregularity in the time or manner of assessment of property, or other irregularity or omission not affecting the equality or substantial justice of such tax, and such taxes shall be inserted in the tax list and shall be collected in the same manner as other general taxes are.

"SECT. 2. That all bonds heretofore issued by any city of the second class in good faith for the erection of, or to procure the means for erecting, a high-school building within such city, or for heating or furnishing the same, whether issued under a general or special law providing therefor, or any bonds hereafter issued by such city in exchange for any such bonds, shall be legal and valid; and any tax heretofore or hereafter levied to pay the interest or a portion of the principal of any such bonds, not exceeding five mills on the dollar valuation of the taxable property in the city in any one year, shall be legal and valid.

"SECT. 3. That in all cases in which cities of the second class have collected and expended, for the use and benefit of such cities, either in works of internal improvement or otherwise, moneys collected from licenses for the sale of intoxicating liquors, such expenditures are hereby declared to be legal, and the same is hereby ratified and confirmed, and such cities of the second class are hereby exonerated from any and all liability therefor.

"SECT. 4. This act shall take effect and be in force from and after its passage." Laws of Nebraska, 1875, p. 205.

Mr. John F. Dillon and *Mr. Wager Swayne* for the plaintiff in error.

Mr. John L. Webster for the defendant in error.

MR. JUSTICE MATTHEWS delivered the opinion of the court, and, after making the foregoing statement, proceeded as follows: —

We cannot accept the conclusion, urged upon us by the counsel for the plaintiff in error, that the city of Plattsmouth had authority to issue the bonds in question, under the power conferred upon it as a municipal body, "to borrow money for any purpose within its discretion," without reference to the limit, as to the amount, imposed by the act of 1867, expressly authorizing it to build school-houses. Whatever implications of power as to school buildings might have been admissible, if the law conferring municipal powers had stood alone, must give place to the express declarations, with the accompanying qualifications, contained in the statute that dealt by name with the very subject. And we must, therefore, assume, at the beginning, that while the city of Plattsmouth was authorized to erect a high-school building, it could not lawfully borrow money or issue its bonds for that purpose in excess of $15,000.

We are, therefore, required to consider whether the issue of bonds involved in this litigation can be supported by the subsequent legislation which sought to cure the defects of their origin.

No objection is made to either of the statutes relied on, on the ground that the Constitution of Nebraska of 1867 forbade retroactive legislation. The twelfth section of article 1 of that instrument declares that "no bill of attainder, *ex post facto* law, or any law impairing the obligation of contracts, shall ever be passed." This prohibition would not include legislation of the class now in question.

They are attacked, however, on other grounds.

The first act, — that of Feb. 18, 1873, — it is claimed, is made void by article 8 of section 1 of the Constitution of Nebraska, which declares that "the legislature shall pass no special act conferring corporate powers." It is contended that the act in question, by legalizing bonds of the city, void because it had no power to issue them, is legally equivalent to an act conferring upon the city power to issue bonds, which is conferring corporate power, and, being a special act, is therefore unconstitutional.

But this conclusion we cannot adopt.

The act in question, so far as it relates to the bonds in suit, does not confer any corporate power upon the city in the sense of the Constitution of the State. The statute operates upon the transaction itself, which had already previously been consummated, and seeks to give it a character and effect different in its legal aspect from that which it had when it was *in fieri*. Whether such an effect may be given by a legitimate exercise of legislative power, depends upon those considerations which draw the line beyond which retroactive laws cannot pass, and is not affected by the supposed form of the enactment as a special or general act conferring corporate power. For it operates upon the rights of the parties, as determined by the equity of their circumstances and relations, and gives to them the sanction derived from subsequent confirmation, by clothing them with forms which are essential to their enforcement, but not to their existence. Within the usual limitations prescribed by our written constitutions, such as have been quoted from that of Nebraska, this may be done, provided it can be done without the destruction of rights recognized by the law as vested.

In the present case the statute in question does not impose upon the city of Plattsmouth, by an arbitrary act, a burden without consent and consideration. On the contrary, upon the supposition that the bonds issued, as to the excess over $15,000, were void, because unauthorized, the city of Plattsmouth received the money of the plaintiff in error, and applied it to the purpose intended, of building a school-house on property the title to which is confirmed to it by the very statute now claimed to be unconstitutional, and an obligation to restore the value thus received, kept, and used, immediately arose. This obligation, according to general principles of law accepted in Nebraska, was capable of judicial enforcement. *Clark* v. *Saline County*, 9 Neb. 516; *Louisiana* v. *Wood*, 102 U. S. 294; *New Orleans* v. *Clark*, 95 id. 644; *Hitchcock* v. *Galveston*, 96 id. 341; *Parkersburgh* v. *Brown*, 106 id. 487; *Chapman* v. *County of Douglass*, *ante*, p. 348.

As was said by Mr. Justice Field, in *New Orleans* v. *Clark*: "A law requiring a municipal corporation to pay a demand

which is without legal obligation, but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation, is not a retroactive law, — no more so than an appropriation act providing for the payment of a pre-existing claim. The constitutional inhibition does not apply to legislation recognizing or affirming the binding obligation of the State, or of any of its subordinate agencies, with respect to past transactions." p. 654.

As the city of Plattsmouth was bound, by force of the transaction, to repay to the purchaser of its void bonds the consideration received and used by it, or a legal equivalent, the statute which recognized the existence of that obligation, and, by confirming the bonds themselves, provided a medium for enforcing it according to the original intention and promise, cannot be said to be a special act conferring upon the city any new corporate power. No addition is made to its enumerated or implied corporate faculties; no new obligation is, in fact, created. The language of the Constitution, forbidding special legislation of that description, evidently refers to grants of authority to be exercised by the body itself and in the future, and a consideration of the evil intended to be remedied by the prohibition will confine it to grants of that character, and will not include a statute like that now under discussion. Here the power of the legislative department of the State is directly exercised upon the transaction itself, and upon a matter clearly within the scope of its authority. It was the constitutional duty of the legislature "to pass suitable laws to encourage schools and the means of instruction." Under the terms of this authority, having created, as it did, the city of Plattsmouth a separate school district, it might prescribe the number and character of the school-houses to be provided, and impose, if it saw fit, directly, a tax upon the locality to defray the cost of erecting and maintaining them. What the State might properly have done by direct action it may do through the public agency of a municipal body, such as the city of Plattsmouth, which, in the performance of the duty assigned, does not so much exercise a corporate power of its own as discharge a function of the State. An illustration and example of the distinction is found in the case of *Foster* v. *Commissioners of Wood*

County, 9 Ohio St. 540, where it was held that a public corporation for the construction and repair of highways was really only a part of the machinery of the State, and its officers, county or township officers discharging duties in connection therewith, and that consequently an act of the General Assembly authorizing the body by name to complete the construction of a particular highway, and to make an assessment of the cost upon the property benefited, was not a special act conferring corporate power, within the meaning of the constitutional prohibition. So it was held in *The State* v. *Squire*, 26 Iowa, 340, that while the legislature would not, in view of the constitutional provision of that State, have the power to pass a special law incorporating an independent school district, it would nevertheless have the power to pass a curative act, legalizing the defective organization of a school district already in existence under the general law authorizing the creation of independent school districts.

In view of the decisions of this court and the courts of the several States in this country, affirming the capacity of municipal corporations to accept and administer trusts of property given or devised for purposes of public charity, it would not be denied that the city of Plattsmouth might lawfully receive and apply a gift of money bestowed in trust to pay the principal and interest of the bonds involved in this litigation, as having been issued for the purpose of obtaining means with which to erect a public-school building. The administration of such a trust would not be contested on the ground that it was an enlargement of its corporate powers. But the duty to repay the consideration for them, employed by it in the same uses, already existed; and its enforcement through the legislative act, which prescribed a remedy, is not more open to the same objection. It is not a special act conferring corporate power; it is merely a special act taking away from the corporation the power to interpose an unconscionable defence against a just claim, and to avoid an obligation to pay an equivalent for public benefits, which it has continued to enjoy.

The very proposition involved here was maintained by the Supreme Court of Nebraska in the case of *Commissioners of Jefferson County* v. *The People*, 5 Neb. 127. There it was

decided that a special act of the legislature, authorizing the county commissioners of Jefferson County to provide funds for the payment of certain outstanding warrants of said county, by issuing bonds, selling the same and using the proceeds in payment of warrants issued to contractors for the erection of a court-house and jail, was valid and effectual. The court said: "That Jefferson County is justly indebted to the relator for the amount of the warrants in question will not be controverted; and where such is the case, there is no doubt of the power of the legislature to require the county to issue its bonds for the amount of its indebtedness." In one aspect, this case goes beyond the argument; for it contemplated further action by the corporation in the issue of its bonds.

The second statute — that of Feb. 25, 1875 — is not subject to the objection to the former one just disposed of, for it is a general act "to amend an act to incorporate cities of the second class and to define their powers, approved March 1, 1871, and to legalize certain taxes therein mentioned," and the terms of its second section embrace the case of the bonds in controversy in this suit. It expressly declares "that all bonds heretofore issued by any city of the second class in good faith for the erection of, or to procure the means for erecting, a high-school building within such city, or for heating or furnishing the same, whether issued under a general or special law providing therefor, or any bonds hereafter issued by such city in exchange for any such bonds, shall be legal and valid; and any tax heretofore or hereafter levied to pay the interest or a portion of the principal of any such bonds, not exceeding five mills on the dollar valuation of the taxable property in the city in any one year, shall be legal and valid."

Accordingly objections are made to its validity for want of conformity to other provisions of the Constitution of the State, the first of which, — that it conflicts with sect. 19, art. 2, which declares that "no bill shall contain more than one subject, which shall be clearly expressed in its title," — it is claimed, applies to both acts.

In regard to the special act of Feb. 18, 1873, however, it seems to us unnecessary to say more than that the title appears to be a full and apt description of the whole contents of the

act. The proceedings of the city council in reference to the construction of a high-school building, which it is the object of the act, as expressed in the title, to legalize, necessarily includes the issue of the bonds authorized by it for that purpose.

In *White* v. *The City of Lincoln*, 5 Neb. 505, 516, it was said that "the object of this constitutional provision is to prevent surreptitious legislation by incorporating into bills obnoxious provisions which have no connection with the general object of the bill, and of which the title gives no indication. It will be sufficient, however, if the law have but one general object, which is fairly expressed in the title of the bill."

Accordingly it was held in that case, as it was also in *City of Tecumseh* v. *Phillips*, id. 305, that the third section of the act of Feb. 25, 1875, which ratified expenditures by cities of the second class of moneys illegally collected for licenses for the sale of intoxicating liquors, was void, because there was nothing in the title of the act to indicate the object contemplated by that section. "It is in nowise amendatory," said the court, in *City of Tecumseh* v. *Phillips*, *supra*, "of the general incorporation law for cities of the second class, nor does it make any allusion to the legalization of any taxes whatever." And in the same case, speaking of the entire act, the court said: "But we fail to discover wherein it is in any particular amendatory of the general act relating to cities of the second class."

The act, therefore, may be considered as if its title were simply that of "an act to legalize certain taxes therein mentioned."

The second section, which is the only one material in this controversy, does legalize taxes theretofore or thereafter levied to pay the interest on certain bonds; namely, such as having been theretofore issued by any city of the second class, in good faith for the erection of, or to procure the means for erecting, a high-school building within such city, or for heating or furnishing the same, whether issued under a general or special law providing therefor, &c., are thereby declared to be legal and valid.

It is impossible to say that legalizing the bonds, and the taxes levied to pay them, are two diverse subjects, when to

legalize the taxes necessarily makes the bonds valid; for nothing more strongly confirms an invalid bond than to make provision for its payment. We have no hesitation, therefore, in upholding the second section of the act of Feb. 25, 1875, as a valid enactment, so far as the present objection is concerned.

As we do not consider it as an act to amend the general law incorporating cities of the second class, rejecting that portion of the title, it is not subject to the further objection, that it does not conform to the constitutional requirement that "no law shall be revived or amended, unless the new act contain the entire act revived and the sections amended."

The remaining objection is not to its validity, but to its application to the present case. It is argued that the second section of the act relates only to bonds that have been issued "under a general or special law providing therefor;" and that the bonds now in controversy were not so issued, and cannot, therefore, claim support from this provision.

If by this is meant, that no bonds are within the purview of this section, except such as have been lawfully issued, the conclusion results in an absurdity; for it supposes an act of the legislature passed to cure the invalidity of valid bonds.

If, on the other hand, the section is construed to mean that all bonds that have been issued in good faith, for the purposes mentioned, and under color of law, whether general or special, but without actual authority, shall be deemed to be legal and valid, the only rational and worthy effect is given to the enactment that can be deduced from its terms. We do not doubt that such was the purpose of the legislature, and that it is the meaning of the law.

In our opinion, the bonds in controversy are valid obligations of the city of Plattsmouth, under either of the two acts, of Feb. 18, 1873, and of Feb. 25, 1875, respectively; and the Circuit Court erred in its instructions to the jury to the contrary. For that error, the judgment is reversed and the cause remanded with instructions to grant a

New trial.

MEMPHIS AND CHARLESTON RAILROAD COMPANY v. ALABAMA.

The Memphis and Charleston Railroad Company is made by the statutes of Alabama an Alabama corporation; and, although previously incorporated in Tennessee also, cannot remove into the Circuit Court of the United States a suit brought against it in Alabama by a citizen of Alabama.

ERROR to the Circuit Court of the United States for the Northern District of Alabama.

The case is stated in the opinion of the court.

Mr. William Y. C. Humes and *Mr. Milton Humes* for the plaintiff in error.

Mr. Enoch Totten, *contra*.

MR. JUSTICE GRAY delivered the opinion of the court.

This action was brought by the State of Alabama, for the use of Jackson County, in a court of that State, against a railroad corporation whose road passed through that State and county, to recover the amount of a county tax assessed upon its property. It was removed into the Circuit Court of the United States for the Northern District of Alabama, upon the petition of the corporation, alleging that it was a citizen of the State of Tennessee and the plaintiff was a citizen of Alabama. Upon the motion of the plaintiff, and the introduction in evidence of the acts of the legislatures of Tennessee, Alabama and Mississippi, relating to the defendant corporation, and of its organization under those acts, the Circuit Court, following its own decision in *Copeland* v. *Memphis & Charleston Railroad Co.*, 8 Woods, 651, remanded the case to the State court, upon the ground that the defendant was a corporation chartered by the State of Alabama; the defendant thereupon excepted and sued out this writ of error.

The question decided by the Circuit Court, and argued by the plaintiff in error, depends upon the provisions of the statutes of Alabama.

The first act of the legislature of Alabama upon the subject, passed on the 7th of January, 1850, is entitled "An Act to incorporate the Memphis and Charleston Railroad Com-

pany," and has this preamble: "Whereas an act was passed by the State of Tennessee, bearing date the 2d day of February, 1846, and the same was amended by an act of the same State, dated Feb. 4th, 1848, for the formation of a company, under the name and style of the Memphis and Charleston Railroad Company, for the purpose of establishing a communication by railroad between Memphis, Tennessee, and Charleston, South Carolina; and whereas it is believed that the most eligible route for said road is through a portion of this State; and whereas it is also believed that great and lasting benefits will accrue to the inhabitants of this State from said improvement: Therefore"

It then proceeds, in the first section, to provide that "the said company shall have the right of way through the territory of this State to construct their road" between certain points named, "and said company shall have and enjoy all the rights, powers and privileges granted to them by the act of incorporation above mentioned, and shall be subject to all the liabilities and restrictions imposed by the same, together with the following requirements."

The second section provides that "in the event said road shall be located through Tuscumbia, it shall be the duty of the company to construct a branch to Florence; and in the event said road shall pass on the north side of the Tennessee River near Florence, it shall be the duty of said company to construct a branch to Tuscumbia: provided, that the subscription in the town or county applying for such branch shall be fully sufficient to pay the cost of the same."

The third section provides that "the said company shall be authorized and required to open books for the subscription of stock in the capital of said corporation in the State of Alabama, so as to afford the citizens thereof an opportunity to take stock to the amount of fifteen hundred thousand dollars of the capital of said company: provided, that if said fifteen hundred thousand dollars be not subscribed in Alabama within ninety days after the books are opened, then it may be taken elsewhere."

The fourth section provides that "the said company shall, at the first meeting of the stockholders, designate a time when,

and a place or places in North Alabama where, for the convenience of the citizens of the State who may be stockholders, the subsequent election for directors shall be held, and shall give notice thereof in one or more newspapers published in North Alabama; and said elections shall be held at the same time both in this State and in Tennessee."

The fifth section provides that "the moneys subscribed by the citizens of Alabama, whether by the State, counties, corporations or individuals, shall first be applied to the construction of the road within the limits of the State of Alabama, and said moneys shall be placed in some safe depository in North Alabama until required for use: provided, that nothing in this section shall be so construed as to prevent the company from putting under contract the whole road whenever in their estimation a sufficient amount of funds shall have been obtained."

The sixth section provides that "said company shall not charge for the transportation of persons or property any higher rates on one part than on another of said road; but the tolls shall be equal and uniform on every part of said road for articles of the same description, whether passing in one direction or the other."

So far, it is not made quite clear whether the words "said company," as used in the body of the act, refer to the company which the act in its title purports to incorporate, or to the company, mentioned in the preamble, for the formation of which acts had been passed by the State of Tennessee.

But that these words do not refer to the Tennessee corporation, and are meant to designate an Alabama corporation, is made plain by the repeated use of the words "the company hereby incorporated" in the seventh section, which is as follows: "The company hereby incorporated shall not locate their road on the track of the Tennessee Valley Railroad, nor of any other railroad which has heretofore been chartered by this State, provided companies have been organized under the same, without first procuring the assent by agreement with said companies; but it shall be lawful for the company hereby incorporated to acquire by purchase, gift, release or otherwise, from any other company, all the rights, privileges and immunities of said company, and possess and enjoy the same as

fully as they were or could be possessed or enjoyed by the company making the transfer."

The two other sections of the act also seem to regard the corporation as created as well as controlled by the State of Alabama; for the eighth section provides that "any railroad company now chartered or hereafter to be chartered in this State shall have the right to connect their road with the road authorized by this act;" and the ninth section provides that "nothing contained in this act shall prevent the State of Alabama from levying and collecting such taxes on the property of said company within this State as shall by the General Assembly of the State be assessed on the property of other railroads in this State; nor shall anything therein be construed so as to prevent the chartering and building other railroads in the State coming within any distance whatever of said road, anything in the said law of Tennessee to the contrary notwithstanding." Statutes of Alabama of 1849–50, c. 128.

The whole act, taken together, manifests the understanding and intention of the legislature of Alabama that the corporation, which was thereby granted a right of way to construct through this State a railroad, with which any railroad company chartered or to be chartered in this State should have the right to connect its road; and which was required to construct a branch railroad in this State, to open books for subscriptions of stock to a certain amount in this State, to apply the moneys here subscribed to the construction of the road within this State, and to hold elections in this State; was and should be in law a corporation of the State of Alabama, although having one and the same organization with the corporation of the same name previously established by the legislature of Tennessee.

The subsequent acts of the State of Alabama point in the same direction, and each speaks of the company as incorporated or chartered by the legislature of Alabama.

The act of the 12th of February, 1850, is entitled "An Act to amend an act entitled 'An Act to incorporate the Memphis and Charleston Railroad Company,' approved Jan. 7th, 1850," and provides that if "the subscribers to the capital stock of the Memphis and Charleston Railroad in the State of Alabama,

from a failure to obtain the necessary legislation from the States of Tennessee and Mississippi, or from any other cause, deem it expedient to form a separate and independent organization, then and in that event they are hereby vested with full power and authority to do the same; and said company so organized shall be known by the name and style of the Mississippi and Atlantic Railroad Company, and shall have and enjoy all the rights, privileges and powers heretofore granted or intended to be granted, and be subject to all the limitations, restrictions and liabilities heretofore imposed or intended to be imposed, in the several acts incorporating the Memphis and Charleston Railroad Company." Statutes of Alabama of 1849–50, c. 129.

The act of the 7th of February, 1856, which, as mentioned in its title and provided in its first section, grants to "the Memphis and Charleston Railroad Company" a right of way for an extension of its road through the territory of this State, expressly provides in the second section that "said right of way is granted upon the same terms, restrictions, liabilities and conditions, that the right of way is granted to said company under the charter granted to said company by the General Assembly of this State, and approved 7th January, 1850." Statutes of Alabama of 1855–56, c. 302.

The defendant, being a corporation of the State of Alabama, has no existence in this State as a legal entity or person, except under and by force of its incorporation by this State; and, although also incorporated in the State of Tennessee, must, as to all its doings within the State of Alabama, be considered a citizen of Alabama, which cannot sue or be sued by another citizen of Alabama in the courts of the United States. *Ohio & Mississippi Railroad Co.* v. *Wheeler*, 1 Black, 286; *Railway Company* v. *Whitton*, 13 Wall. 270, 283.

This view being conclusive against the claim of the plaintiff in error, it is unnecessary to consider whether the action, brought by the State of Alabama for the use of one of its counties, can be considered as a suit brought by a citizen of the State of Alabama, within the meaning of the Constitution and laws of the United States.

Order remanding the cause affirmed.

AMBLER v. CHOTEAU.

Where the object of a suit in chancery is the recovery of the damages which the complainant alleges that he has sustained by reason of an unlawful and fraudulent conspiracy to cheat him out of his interest in an original invention, which is the subject-matter of the controversy, the bill should be dismissed, as his remedy is at law.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

The case is stated in the opinion of the court.

Mr. Oliver D. Barrett and *Mr. Augustine I. Ambler* for the appellant.

Mr. Philip Phillips and *Mr. W. Hallett Phillips* for the appellees.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is a suit in equity, and the case made by the bill may be stated as follows: —

Ambler, the appellant, and one R. M. Whipple, invented an improved mode of manufacturing gas from petroleum, for which they were about to apply for patents, and being desirous of securing each to the other one undivided half of what they were doing, entered, on the 24th of May, 1869, into an agreement of copartnership to effect that object. The third article of the agreement was as follows: —

"ARTICLE THIRD. — R. M. Whipple shall have the exclusive and entire 'business management' of the same, so as to include the introduction of said invention to public use, and to secure, as far as possible, the adoption of the same, both in this country and in all other countries; and for which purpose, and all and singular the purposes incident thereto, the said R. M. Whipple shall have full and ample power and authority, and is hereby granted by said Ambler full power and authority to act for him in the premises, to sign his name, and make his seal to any instrument, and all instruments of writing needful and necessary to carry out the object and intention of this agreement, as fully and entirely as the same may be done by the said Ambler if personally present at the doing

thereof; and the said A. I. Ambler hereby ratifies and confirms all and singular whatsoever may be legally and lawfully done in and about the premises."

All patents secured for the invention were to be put into the business and owned by the parties in equal shares. The proceeds of sales and all other profits were to be equally divided.

For the purpose of carrying into effect the provisions of the partnership agreement, Ambler, on the 25th of May, executed to Whipple an assignment of all his interest in the invention and in the patents that might be issued thereon. The agreement and assignment were both recorded in the Patent Office. On the 13th of July, 1869, a patent was issued to Whipple & Ambler for "Whipple & Ambler's Steam Petroleum Gas-Generating Apparatus," which was embraced in their inventions. In September, 1869, Whipple fraudulently determined to exclude Ambler from the benefits of their undertaking, and to accomplish that purpose formed another partnership with one Thomas S. Dickerson, to whom, in October, 1869, a patent was issued for an improved mode of manufacturing gas from petroleum, which was the invention of Whipple & Ambler. Afterwards another patent was issued to Whipple & Dickerson, which came within the scope of the Whipple & Ambler experiments. In this condition of affairs, Ambler, on the 4th of January, 1870, began a suit in equity in the Supreme Court of the District of Columbia against Whipple & Dickerson, the object of which was to bring the Dickerson and the Whipple & Dickerson patents into the Whipple & Ambler partnership, and to get an account of sales and profits. That court dismissed the bill; but that decree was, on appeal, reversed here, at the October Term, 1874, and the cause remanded with instructions to enter another decree, "declaring Whipple & Dickerson to hold in trust for the benefit of Ambler to the extent of one-half of the two patents issued to them," and "that an accounting be had as to the profits realized by them, or either of them, from the use or sale, or otherwise, arising from said patents." *Ambler* v. *Whipple*, 20 Wall. 546, 559. A decree was entered in the court of the District on the 2d of February, 1875, in accordance with this mandate,

and afterwards upon an accounting a balance was found due from Whipple of $666,052.35. Whipple is insolvent, and the amount due from him is uncollectible.

On or about the 21st of April, 1870, Whipple & Dickerson sold and conveyed to James G. Blunt and Merritt H. Insley, of the State of Kansas, the right to use the Dickerson patent in Missouri for $35,000, and on the 23d of December, 1871, the right to use the Whipple & Dickerson patent in the same State for the same sum. On the 18th of December, 1871, Charles P. Choteau, Gerard B. Allen, Charles H. Peck, Stilson Hutchins, Theodore Laveille, George H. Rea, Albert C. Ellithorpe, John Kupferle, James G. Blunt, M. H. Insley, Charles P. Warner, Frank Gregory, and Oliver B. Filley organized a corporation under the general corporation law of Missouri by the name of the Missouri Liquid Fuel Illuminating Company, with an authorized capital of $500,000, divided into five thousand shares of one hundred dollars each. The persons thus organizing the corporation were, by the articles of association, constituted directors for the first year. On the 23d of December, 1871, Blunt & Insley, in consideration of $83,000 in cash, or its equivalent, and $417,000 in capital stock, assigned to this company all their right to the Dickerson and Whipple & Dickerson patents for the State of Missouri. At the same time Whipple & Dickerson agreed with the company to make such conveyance as might be deemed necessary to perfect the title of the company under the assignment from Blunt & Insley. When these several transactions took place all the parties had full notice of all the rights and claims of Ambler in the premises.

This suit is brought against Choteau, Harrison, Allen, Peck, Rea, Laveille, Warner, Gregory, and Filley. All the other corporators and directors, and so far as appears the stockholders of the Missouri corporation, are named as defendants in the bill, but they were never served with process, and have never appeared. Neither Whipple, Dickerson, nor the Missouri corporation is even named as a defendant. The persons who are served and who appear in the cause hold, or are interested in, the stock of the corporation to the amount of $150,000 or thereabouts. The bill abounds in charges of fraud and con-

spiracy, in a general way, against all the persons who are named, whether parties to the suit or not; but, so far as the defendants served with process are concerned, the only specific allegation to be found is that, being "incorporators of the Missouri Liquid Fuel and Illuminating Company," they "made said purchase and paid said large sum of money with full knowledge of the trust and of the fraud and breach of trust aforesaid [that of Whipple & Dickerson], and with lawful and timely notice of your orator's legal rights and equitable title therein, without any effort whatever on the part of said directors of said company to protect your orator's share of the purchase-money, as they were bound in law, in equity, and good conscience to do in this behalf, and without the knowledge or consent of your orator and to your orator's damage and injury."

At the opening of the bill it is expressly averred "that the subject-matter of this complaint and the foundation and gravamen of this bill is the franchise, the trust, the breach of trust, the collusion, conspiracy, and fraud between the defendants and said Whipple & Dickerson, as the trustees of your orator, the rights and remedies of your orator against these defendants, and the prayer for relief." It is then stated "that this cause is an action on the case in the nature of a conspiracy, founded upon the fraudulent intention and specific acts of the defendants to cheat, swindle, and defraud your orator of his franchise, and the rights in the patent and trust property aforesaid, and that said plan consists in an agreement with a common design to do an unlawful act, and which plan, agreement, and conspiracy, being a common design to do an unlawful act, was fully carried out, as will hereafter more fully appear, to the great damage and injury of your orator."

It is nowhere alleged that these defendants had any actual connection with the transactions of Whipple and Dickerson otherwise than as corporators, stockholders, and directors of the Missouri corporation, though it is stated that they "gave to such fraudulent firm [Whipple & Dickerson] credit, character, and support by dealing with them," &c., and that they "took no steps whatever, legal or otherwise, to recover said property or the proceeds thereof, or to stay Whipple & Dickerson in

the pursuit and furtherance of the fraud in the waste of the proceeds of the trust," &c.

The prayer is that the defendants may be enjoined "from proceeding further with any dealings with the said partnership and trust property aforesaid," and "that the damages to your orator for the wrong and injury done in this behalf may be duly considered, and that an account be taken thereof before the master, . . . and that your orator, upon the final hearing, be allowed, adjudged, and decreed damages therefor."

This is the substance of all there is material in the mass of irrelevant matter that incumbers the record and fills the voluminous argument filed by the appellant in his own behalf. Upon full consideration we have no hesitation in saying that it presents no case for such relief in equity as is asked. If, as is more than once distinctly alleged, the object of the suit is to recover damages for an unlawful and fraudulent conspiracy to cheat Ambler out of his interest in the original invention which is the subject-matter of the controversy, the remedy is clearly at law, and not in equity. If an account of profits is wanted, and an injunction against the further use of the patented inventions under the transfers from Whipple & Dickerson, then the suit should have been against the Missouri corporation in its corporate capacity, and not against a part only of its stockholders and directors individually. If the object is to charge these defendants for the profits made by Whipple through his breach of trust, then he is a necessary party, and nothing can be done in his absence. In any event, these defendants are but purchasers from Whipple of specific interests in the property which he held in trust for himself and Ambler. While the allegations of fraud in their general terms are as broad as language can make them, specifically they are confined by other allegations to the use of the patented invention in Missouri by the Missouri corporation, of which the defendants are stockholders and directors. It is not in any manner alleged or claimed that the defendants have profited by what Whipple has done, except through the title acquired by the conveyance to Blunt & Insley, and from them, with the consent of Whipple & Dickerson, the faithless trustees, to the corporation. No effort is made to set aside these conveyances.

It is conceded that Blunt & Insley actually paid Whipple & Dickerson $70,000 for the assignments which were made, and it is fairly to be inferred that in the accounting had under the decree of this court in *Ambler* v. *Whipple & Dickerson*, Whipple has been charged with the proceeds of this sale. But, whether that be so or not, no case has been made by the loose and general allegations in this bill for relief against these defendants. The words "fraud" and "conspiracy" alone, no matter how often repeated in a pleading, cannot make a case for the interference of a court of equity. Until connected with some specific acts for which one person is in law responsible to another, they have no more effect than other words of unpleasant signification. While in this case the offensive words are used often enough, the facts to which they are applied are not such as to make the defendants answerable to the complainant for the damages and other relief he asks.

Decree affirmed.

UNION TRUST COMPANY *v.* SOUTHER.

Where the complainant prays for the appointment of a receiver of mortgaged railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound discretion, may, as a condition of granting the prayer, impose such terms touching the application of the income arising during the receivership to the payment of outstanding debts for labor, supplies, equipment, or permanent improvement of the property, as under the circumstances of the case appear reasonable. *Fosdick* v. *Schall*, 99 U. S. 235, and *Miltenberger* v. *Logansport Railway Co.*, 106 id. 286, cited and approved.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

This appeal was taken because of a difference of opinion between the circuit judge and the district judge holding the Circuit Court as to a matter decided, and the facts on which the questions certified depend may be stated as follows:—

On the 7th of October, 1871, the Cairo and St. Louis Railroad Company mortgaged its property, franchises, tolls, incomes, and profits to the Union Trust Company of New York,

to secure an issue of bonds amounting in the aggregate to $2,500,000. Default was made in the payment of the interest falling due Oct. 1, 1878, and semi-annually thereafter. On the 6th of December, 1877, the Trust Company filed its bill to foreclose the mortgage, averring, among other things, that the railroad company is insolvent; "that many and large claims exist against it of the character known as floating debt; and that unless a receiver is appointed . . . great, irreparable damage to said bondholders will ensue, and the property will be liable to be greatly depreciated, and to be involved in useless litigation; and your orator and its bondholders will lose the benefit thereof as a security for the payment of said bonds." Upon this allegation it was prayed that the "court will appoint a receiver according to the course and practice of this court, with the usual powers of receivers in like cases."

As soon as the bill was filed a receiver was appointed, and in making the appointment the court, of its own motion, entered the following order: —

"And said receiver, after paying the expenses of operating, maintaining, and repairing said railroad and property, and after making such other payments herein authorized as are or may be necessary for the conduct of such receivership, shall pay and discharge all amounts due and owing by said railroad company for labor, or supplies, that may have accrued in the operation and maintenance of such railroad property within six months immediately preceding the rendition of this decree."

In 1876 the railroad company paid $3,000 to the beneficiaries under the mortgage on account of their expenses, to a much larger amount, in keeping an agency in the United States, and in connection with the forbearance which they had given the company in respect to overdue interest. Previous to the appointment of the receiver none of the current income of the company, except this single amount, had been paid to the bondholders.

When the order in respect to debts for labor and supplies was entered, the court instituted no special inquiries in respect to the use which had been made of the income prior to that time.

The receiver thus appointed took possession of the property

and operated the road until the end of the year 1881, and after a sale had been perfected under a decree of foreclosure. During the receivership the net earnings of the road, after paying all operating expenses, exceeded $200,000. The whole amount was, however, under the orders of the court, with the consent of the Trust Company, from time to time, expended "in purchasing additional grounds, rolling-stock, &c., and in making permanent repairs and improvements upon said railroad property, instead of discharging therewith the claims of [against] the railroad company for labor, materials, and supplies" during the six months immediately preceding the appointment of the receiver; and when the property was finally sold, over $65,000 of these debts remained unpaid. Among them was one to E. E. Souther & Brother amounting to $532.14 for supplies. On the 9th of May, 1878, after the receiver got into possession of the road, Souther & Brother filed in the suit for foreclosure an intervening petition praying for the allowance of their claim and its payment. On the 16th of May the claim was allowed and the receiver directed to pay it out of the net earnings "and before any improvements or ameliorations are made upon the property in his hands as receiver." On the 5th of June, both the Trust Company and the receiver filed motions to set aside this order. These motions remaining undisposed of, the road was sold under a decree of foreclosure in 1881, and brought only $4,000,000, when the amount due under the mortgage was $4,300,000 and some more. After the report of the sale was made, and a deficiency appeared, the court, on the 8th of September, 1882, set aside the order for the payment of the debt to the intervenors and allowed the Trust Company to answer. An answer was filed and proof taken which disclosed the foregoing facts. Upon the facts so established one of the questions which arose was, whether, under the circumstances, the court had the right to make an order directing the payment of the claim. The circuit judge was of the opinion that it had, and a decree was entered accordingly. From that decree this appeal was taken.

Mr. S. Corning Judd and *Mr. William F. Whitehouse* for the appellant.

Mr. T. C. Mather for the appellee.

MR. CHIEF JUSTICE WAITE, after stating the case, delivered the opinion of the court.

It seems to us that the question certified is fully disposed of by *Fosdick* v. *Schall*, 99 U. S. 235, 251, where it was said, "We have no doubt that when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable." To this we adhere, and, in our opinion, the right to impose terms does not depend alone on whether current earnings have been used to pay the mortgage debt, principal or interest, instead of current expenses. *Miltenberger* v. *Logansport Railway Company*, 106 id. 286. Many other circumstances may make such an order reasonable, and this case furnishes a striking example. The first default in the payment of interest under the mortgage occurred in October, 1873. The bondholders did not see fit to take possession, as they had the right to do, when the default had continued for six months. On the contrary, notwithstanding no payments of interest had been made, they allowed the company to operate the road and incur obligations therefor until December, 1877. This was evidently in the hope that their condition would be improved by the delay; for to effect the forbearance they established an agency and incurred expenses to an amount much larger than the $3,000 reimbursed by the company. Prior to the appointment of the receiver the gross earnings do not appear to have been enough to pay expenses, but afterwards they yielded a very considerable surplus. There cannot be a doubt that it was for the interest of the bondholders that the road should be kept in operation, and as they did not see fit to take possession while it could only be operated at a loss, it was certainly not an abuse of judicial discretion for the court to order, as a condition of granting their application for a receiver, that debts incurred by the company in thus protecting the security should be paid

from the income of the receivership, if, in consequence of an increase of revenue, it could be done.

The income of the receivership, instead of being applied in accordance with the order to pay the debts for the supplies and labor, was used, with the consent, and, it may fairly be inferred, at the request of the bondholders, to buy additional grounds, rolling-stock, &c., and to make permanent improvements, thus adding to the value of the property, which was afterwards sold. There is nothing whatever to indicate that in thus using the income it was the intention of the court to revoke the original order. It seems to have been found, in the administration of the cause, that by using the income to add to the value of the fixed property the interests of all parties would be promoted, and so the fund, which in equity belonged to the labor and supply creditors, was for the time being diverted from them and put into improvements and additions, the proceeds of which are now in court. It is not to be presumed that this diversion would have been authorized if the value of the property added to and improved was not to be correspondingly increased. Clearly, therefore, on the face of the transaction, the fund in court represents in equity the income which belongs to the labor and supply creditors as well as the mortgage security, and there was no impropriety in appropriating it as far as necessary to pay the creditors specially provided for when the receiver was appointed. Such a practice, under proper circumstances, was approved in *Fosdick* v. *Schall*, *ubi supra*, and seems to us eminently just.

There were other questions certified in the case, but as we answer the one which has been particularly stated in the affirmative, and nothing more is needed to sustain the decree, the others will not be considered further than has already been done incidentally. *Decree affirmed.*

NOTE. — *Union Trust Company* v. *Fitzgerald*, appeal from the Circuit Court of the United States for the Southern District of Illinois, was submitted at the same time as the preceding case, by the same counsel for the appellant, and by *Mr. Thomas C. Fletcher* for the appellee.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The facts and questions certified in this case are in all material respects like those in *Union Trust Company* v. *Souther*, *ante*, p. 591. It is, therefore, unnecessary to answer the questions further than by reference to what was said in that case

Decree affirmed.

UNION TRUST COMPANY *v.* WALKER.

An assignment of such claims as are mentioned in *Union Trust Company* v. *Souther, ante,* p. 591, passes the right of the original holder to payment out of the fund in the hands of the receiver.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

Mr. S. Corning Judd and *Mr. William F. Whitehouse* for the appellant.

Mr. Thomas C. Fletcher for the appellee.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This case differs from *Union Trust Company* v. *Souther*, *ante*, p. 591, only in the fact that Walker, the present intervenor and appellee, is the assignee by purchase from the original holders of the claims he seeks to have paid, and one of the questions certified is whether, being an assignee and not an original holder, he is entitled to payment. We have no hesitation in answering this question in the affirmative. As was said in *Fosdick* v. *Schall*, 99 U. S. 235, 253, these creditors are paid not because they have in law a lien on the mortgaged property or the income, but because in equity the earnings of the company constitute a fund for the payment of the expenses which their claims represent, before any income arises which ought to be applied to the discharge of the mortgage debt. Under such circumstances, it is a matter of no importance that the original creditor has parted with the claim. The right is one that attaches to the debt and not to the person of the original creditor. Consequently the right passes with an assignment of the debt.

Decree affirmed.

DAVIS v. SOUTH CAROLINA.

1. Section 643 of the Revised Statutes, which provides for removing to the Circuit Court suits or criminal prosecutions commenced in a State court against "any officer appointed under or acting by authority of any revenue law, or any person acting under or by authority of such officer," applies to marshals of the United States, their deputies and assistants, when engaged in enforcing a revenue law of the United States.
2. Where such a prosecution is duly removed, the jurisdiction of the Circuit Court completely vests, and the subsequent action of the State court, forfeiting the recognizance of the defendant for his non-appearance there, is *coram non judice* and void.

ERROR to the Supreme Court of the State of South Carolina.

The case is stated in the opinion of the court.

The Solicitor-General for the plaintiffs in error.

The Attorney-General of South Carolina, contra.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

Lemuel Davis was indicted for the murder of one Hall in the Court of General Sessions for the County of Spartanburg, in South Carolina, in July, 1876; and, being in custody, it was ordered by the court that he be enlarged on giving bail for his appearance at the next term of the court, it being required that the bond should contain a condition that it should be forfeited in case the prisoner should be ordered beyond the limits of the State by the proper authority of the army of the United States. He entered into a recognizance accordingly, the other plaintiffs in error being his sureties.

The prisoner thereafter presented to the Circuit Court of the United States for the District of South Carolina a petition, which is set out in the record, as follows: —

"UNITED STATES OF AMERICA,

"*District of South Carolina, Fourth Circuit:*

"To the Judges of the Circuit Court —

"The petition of Lemuel J. Davis, corporal of Company K, 18th U. S. Infantry, shows:

"That some time in February, 1876, he was detailed to serve as one of a guard of United States soldiers to aid Deputy Marshal James Jarrett in making the arrest of one Brandy Hall under a

warrant issued by a U. S. commissioner, for violation of internal revenue laws as a distiller.

"That said guard of U. S. soldiers consisted of two men under the command of First Lieutenant W. A. Miller, 18th U. S. Infantry. That said guard, under command of said Lieutenant Miller, proceeded with Deputy Marshal James Jarrett to the house of said Brandy Hall, for the purpose of arresting him. That for the purpose of making the arrest, the house of said Hall was surrounded. This petitioner was stationed at the back door of the house for the purpose of guarding the same, and preventing the escape of said Hall. That the deputy marshal, Jarrett, went to the front of the house for the purpose of effecting an entrance, and arresting said Hall. That at the time he did so, and while your petitioner was guarding the back door, said Hall made his escape through a hole in the side of the house near where petitioner was standing, sprang past him, frightening his horse, and accidentally discharging his piece.

"That by the discharge of his said piece the said Hall was shot and mortally wounded, and subsequently died of said wound. Your petitioner shows that at the time of said accident he was in the discharge of his duty, and that said shooting of said Hall was purely accidental, and your petitioner is in no way responsible therefor. Your petitioner shows that he has been arrested and bound over for trial in the Circuit Court of the State of South Carolina for Spartanburg County for the murder of said Hall.

"That an indictment by the grand jury of that county for murder was found at the August term of said court against your petitioner, and your petitioner was put upon his trial thereon. That the jury before whom he was tried found your petitioner guilty of manslaughter. That the court thereupon set aside said verdict and granted a new trial. Your petitioner shows that he is illegally and unlawfully held for trial under the order of said court, and prays your honors to grant a writ to remove said cause for trial in the Circuit Courts of the United States for the District of South Carolina, now being held at Columbia in said State.

"(Signed) LEMUEL J. DAVIS."

"Personally appears before me, Corporal Lemuel J. Davis, who, being duly sworn, deposes and says the above petition is true of his own knowledge. LEMUEL J. DAVIS."

"Sworn and subscribed before me the second day of December, A. D. 1876.

[SEAL OF COURT.] "J. E. HAGOOD,
"*C. C. C. U. S. Dist. of S. C.*"

"UNITED STATES OF AMERICA,
"*District of South Carolina, Fourth Circuit:*
"EX-PARTE, LEMUEL J. DAVIS,
"18th U. S. Infantry. } Petition for *habeas corpus.*

"I certify that I represented the petitioner upon his trial at Spartanburg; that I have examined the proceedings against him, and have carefully inquired into all the matters set forth in the petition of the said Davis, and believe them to be true.

"WM. E. EARLE."

On the hearing of this petition, Dec. 4, 1876, it was ordered by the court that a writ of *habeas corpus cum causa* do issue, to be served according to law on the clerk of the Circuit Court for Spartanburg County, and that the marshal do take said Corporal Lemuel J. Davis into his custody, to be dealt with according to law.

On March 12, 1877, an order was made by the circuit judge for the county of Spartanburg in the Court of General Sessions, reciting that the said Lemuel J. Davis had failed to answer when called according to his recognizance, and directing process against him and his sureties to appear and show cause why judgment should not be confirmed against them and their recognizance adjudged to be forfeited.

The plaintiffs in error accordingly appeared and answered the rule, alleging the removal of the cause into the Circuit Court of the United States by the proceedings recited, by reason whereof the said Lemuel Davis was not bound to appear for trial in the Court of General Sessions for the County of Spartanburg, and that consequently there had been no breach of the condition of the recognizance.

Upon this return to the rule to show cause judgment was rendered against the plaintiffs in error, which, on appeal to the Supreme Court of the State, was affirmed. To reverse that judgment the present writ of error is prosecuted.

The learned Attorney-General of South Carolina, who appears here on the part of the State, very properly waives all questions arising in this case which are covered by the decision in *Tennessee* v. *Davis*, 100 U. S. 257.

He seeks to distinguish the present case, however, from that,

upon its circumstances, and claims that Davis was not entitled, by virtue of the capacity in which he was acting, to the benefit of sect. 643, Rev. Stat., and to that end maintains the proposition that, as that section applies only to an "officer appointed under or acting by authority of any revenue law of the United States, or any person acting under or by authority of such officer," it cannot be extended to embrace the case of United States marshals or their deputies or assistants, even when they are engaged in the service of process issued for the arrest of parties accused of violation of the revenue laws of the United States.

In our opinion the distinction cannot be maintained. A marshal or deputy marshal of the United States is, it is true, not an officer appointed under a revenue law; but when engaged officially in lawful attempts to enforce a revenue law, by the arrest of persons accused of offences against it, he is an officer acting under the authority of that law; for it is that law under which is issued the process, which constitutes his authority for his official action. There is, indeed, the general law, prescribing the nature of his duties, which requires him faithfully to execute all lawful process placed in his hands for that purpose; but when process, issued under a particular law, is lawfully issued to him for service, in executing it, he is acting under the authority of that law, without which the process would not be valid. It is that law which he would be compelled to rely on as his justification if he was sued as a trespasser for executing the process issued for its enforcement. And the protection which the law thus furnishes to the marshal and his deputy, also shields all who lawfully assist him in the performance of his official duty. It is not questioned that Davis was acting in that capacity. It is true, he was a non-commissioned officer in the army, detailed as a guard in aid of the marshal, and acting as one of his *posse comitatus;* but this was before such service became unlawful by the passage of the fifteenth section of the act of June 18, 1878, c. 263. Sup. Rev. Stat. 361.

The prosecution against Davis was removed into the Circuit Court in strict compliance with the statute. His petition set out the necessary facts showing that the homicide which was

charged against him as a crime took place while he was in discharge of his official duty; it was verified, and certified as required by law. The writ of *habeas corpus cum causa*, which was issued upon it, was the writ prescribed by the act of Congress in cases of that description, a duplicate of which it requires shall be delivered to the clerk of the State court; and thereupon the statute declares that it shall be the duty of the State court to stay all further proceedings in the cause, and the prosecution, upon delivery of such process, shall be held to be removed to the Circuit Court, and any further proceedings, trial, or judgment therein in the State court shall be void.

When, by virtue of the writ of *habeas corpus*, the prisoner was taken into the custody of the marshal, the jurisdiction of the Circuit Court of the United States of his person and of the indictment against him was completely vested, and that of the State courts ceased altogether. The recognizance was an incident, and followed the principal case. The obligation to appear was transferred with the cause, and he was no longer bound to answer in the court of original jurisdiction. It would have been unlawful for his bail to have surrendered him to that tribunal. They were consequently discharged from the obligation of the recognizance, so far as it required them to do so, or to answer for the default. There was, consequently, no breach of the bail bond in not appearing in the State court, and all proceedings to forfeit it and render judgment upon it against the sureties were *coram non judice* and void. The right to proceed upon it at all against him or them passed from the State court with the transfer of its jurisdiction over the person of the prisoner and the indictment against him.

The judgment of the Supreme Court of South Carolina will be accordingly reversed, and the cause remanded with instructions to enter a judgment reversing the judgment of the Circuit Court for the county of Spartanburg, and directing that court to dismiss the proceeding upon the recognizance for want of jurisdiction; and it is

So ordered.

BASKET v. HASSELL.

1. A certificate of deposit in these terms: —

"EVANSVILLE NATIONAL BANK,
"EVANSVILLE, IND., Sept. 8, 1875.

"H. M. Chaney has deposited in this bank twenty-three thousand five hundred and fourteen $\frac{70}{100}$ dollars, payable in current funds, to the order of himself, on surrender of this certificate properly indorsed, with interest at the rate of six per cent per annum, if left for six months.

"$23,514.70. HENRY REIS, *Cashier*,"

— may, as a subsisting chose in action, be the subject of a valid gift, if the person therein named indorse and deliver it to the donee, and thus vest in him the whole title and interest therein, or so deliver it, without indorsement, as to divest the donor of all present control and dominion over it, and make an equitable assignment of the fund, which it represents and describes.

2. A *donatio mortis causa* must, during the life of the donor, take effect as an executed and complete transfer of his possession of the thing and his title thereto, although the right of the donee is subject to be divested by the actual revocation of the donor, or by his surviving the apprehended peril, or by his outliving the donee, or by the insufficiency of his estate to pay his debts. If by the terms and condition of the gift it is to take effect only upon the death of the donor, it is not such a *donatio*, but is available, if at all, as a testamentary disposition. Where, therefore, during his last illness, and when he was in apprehension of death, the person named in the above certificate made thereon the following indorsement: —

"Pay to Martin Basket, of Henderson, Ky.; no one else; then not till my death. My life seems to be uncertain. I may live through this spell. Then I will attend to it myself.

"H. M. CHANEY,"

— and then delivered it to Basket, and died at his home in Tennessee, — *Held*, that Basket by such indorsement and delivery acquired no title to or interest in the fund.

3. An appeal will not be dismissed by reason of the omission of certain persons who were parties to the suit in the court below, if they have no interest in maintaining or reversing the decree.

APPEAL from the Circuit Court of the United States for the District of Indiana.

This is a bill in equity, filed by Hassell, administrator of Chaney, a citizen of Tennessee, to which, besides Basket, a citizen of Kentucky, The Evansville National Bank, Indiana, Samuel Bayard, its president, and Henry Reis, its cashier, and James W. Shackelford and Robert D. Richardson, attorneys for Basket, citizens of Indiana, were made parties defendant.

The single question in the case was, whether a certain fund, represented by a certificate of deposit, issued by the bank to Chaney in his lifetime, belonged to Basket, who claimed it as a gift from Chaney, and had possession of the certificate, or to Hassell, as Chaney's administrator. Basket asserted his title not only by answer, but by a cross-bill. The final decree ordered that the certificate of deposit be surrendered to Hassell, and that the bank pay to him, as its holder, the amount due thereon. The money was then tendered by the bank, in open court, and the certificate was deposited with the clerk. It was thereupon ordered, Basket having prayed an appeal, that until the expiration of the time allowed for filing a bond on appeal the bank should hold the money as a deposit at four per cent interest, but if a bond be given, that the same be paid to the clerk, and by him loaned to the bank on the same terms. Basket failed to give the bond required for a *supersedeas*, but afterwards prayed another appeal, which he perfected by giving bond for costs alone. To this appeal Basket and Hassell are the parties respectively, the co-defendants not having appealed, or been cited after severance. On the ground that they are necessary parties, Hassell moves to dismiss the appeal.

The fund which gave rise to the controversy was represented by a certificate of deposit, as follows: —

"EVANSVILLE NATIONAL BANK,

"EVANSVILLE, IND., Sept. 8, 1875.

"H. M. Chaney has deposited in this bank twenty-three thousand five hundred and fourteen $\frac{70}{100}$ dollars, payable in current funds, to the order of himself, on surrender of this certificate properly indorsed, with interest at the rate of 6 per cent. per annum, if left for six months.

"$23,514.70. HENRY REIS, *Cashier*."

Chaney, being in possession of this certificate at his home in the county of Sumner, State of Tennessee, during his last sickness and in apprehension of death, wrote on the back thereof the following indorsement: —

"Pay to Martin Basket, of Henderson, Ky.; no one else; then not till my death. My life seems to be uncertain. I may live through this spell. Then I will attend to it myself.

"H. M. CHANEY."

Chaney then delivered the certificate to Basket, and died, without recovering from that sickness, in January, 1876.

Mr. Philip Phillips and *Mr. W. Hallett Phillips* for the appellant.

Chaney undoubtedly intended, by the indorsement and delivery of the certificate, that Basket should receive the money evidenced by it. The inquiry then is, whether the words used by him are to be construed by some rigorous rule of law so as to defeat his intention.

This subject of donations *causa mortis* was at an early period considered by Lord Hardwicke in *Ward* v. *Turner*, 2 Ves. Sen. 431, in which he held that an actual delivery was indispensable, and that a delivery to the donee, of receipts for South Sea annuities, was not sufficient to pass the property, though it was strong evidence of the intent. The delivery of the receipt was not a delivery of the thing.

After referring to the ruling, that a promissory note or bill of exchange not payable to bearer or indorsed in blank cannot so take effect, inasmuch as no property therein can pass by the delivery of the instrument, and to the like ruling for like reason, as to receipts for South Sea annuities, Story says: "It may admit of doubt whether the doctrine can now, upon principle, be sustained; for the ground upon which courts of equity now support *donationes mortis causa* is not that a complete property in the thing must pass by the delivery, but that it must so far pass by the delivery of the instrument as to give a title to the donee to the assistance of a court of equity to make the donation complete. The doctrine no longer prevails, that where a delivery will not execute a complete gift *inter vivos*, it cannot create a *donatio mortis causa*, because it would not prevent the property from vesting in the executor; and that as a court of equity will not, *inter vivos*, compel a party to complete his gift, so it will not compel the executor to complete the gift of his testator. On the contrary, the doctrine now established by the highest authorities is, that courts of equity do not consider the interest as completely vested in the donee, but treat the delivery of the instrument as executing a trust for the donee to be enforced in equity." Story's Eq. Jur., sect. 607, p. 618.

In *Duffield* v. *Elwes*, Sir John Leach made the declaration that where delivery would not execute a complete gift *inter vivos* it could not create a *donatio mortis causa*. This proposition was directly overruled by Lord Eldon in the House of Lords on appeal. 1 Bligh, N. S. 497.

He held that it was only essential to constitute a *donatio causa mortis* that the delivery should be sufficient to raise a trust, and that equity would compel the representatives of the donor to complete that which was incomplete.

In *Veal* v. *Veal*, the gift was resisted on the ground that the note was payable to order, and not indorsed. Romilly, M. R., after reviewing previous decisions, refers to the fact that Sir John Leach's decision in *Duffield* v. *Elwes* had been overruled in the House of Lords, and says: "I also think it a much more healthy state of the law, that the validity of such a gift should not depend on whether the testator had written his name on the back of the bill or not, if it be the clear intent that he intended to give it." 27 Beav. 303.

In *Grymes* v. *Hone*, 49 N. Y. 17, the owner of certain bank stock made an assignment of the same to his granddaughter, and appointed her his attorney to transfer or sell the same for her use. This paper, after being kept by him for some time, he delivered to his wife, saying: "I intend this for Nelly; if I die, don't give it to the executor." She asked, "Why not give it to her now?" "Well," said he, "better keep it for the present. I don't know how much longer I may last, or what will happen, or whether we may need it."

The action was, by the donee, against the executor for the recovery of the bank stock or its value. Judgment was rendered for plaintiff and affirmed in the court of appeals.

There it was said the transaction as to such a gift is: "The donor says, 'I am ill, and fear I shall die of this illness, wherefore I wish you to take these things and hand them to my granddaughter after my death; but do not hand them to her now, as I may need them.' A good *donatio mortis causa* always implies all this. If delivered absolutely to the donee in person, the law holds it void in case the donor recovers, and he may then reclaim it. To make a valid gift *mortis causa*, it is not necessary there should be any express qualification in the

transfer of delivery. It may be found to be such a gift from the attending circumstances, though the written transfer may be absolute."

It was urged that the gift was not completed, inasmuch as the stock was not transferred on the book of the bank, and could not be until the certificate was surrendered; that equity would not aid a volunteer to perfect an imperfect title. But the court held that, by the modern authorities, the gift was valid, notwithstanding these objections, that the equitable title passed by the assignment, and it was not necessary to hand over the certificate; that a court of equity will compel the donor's representative to produce the certificate, that the legal title may be perfected.

The doctrine as we have announced it is fully sustained by the decisions in Tennessee, where the gift was made.

In *Gass* v. *Simpson*, decided in 1867, Gass, as administrator of Carter, filed his bill, in which he alleged that when Carter left home, in 1862, to join the Union army in Kentucky, from whence he never returned (having died in 1863), he placed in Simpson's hands for safe keeping certain moneys, notes of hand, and receipts, with other valuable papers, all of which complainant was entitled to as administrator.

Simpson answered that when Carter made this deposit with him, he said, if he never returned, he wanted it all to belong to his son, George Simpson, then a youth of six years.

The case was heard on bill and answer, and this was decreed as a good gift *causa mortis*. 4 Cold. (Tenn.) 288.

The certificate of deposit held by Chaney was in all respects the negotiable promissory note of the bank, and, on well-settled decisions, its delivery, with or without an indorsement, would confer a good title.

The learned district judge, in his opinion, admits that it is "now settled that choses in action, whether negotiable or not, may be the subject of gifts *causa mortis*," and that money on deposit may be delivered by delivery of the certificate of deposit.

Nevertheless, he holds that in this case there was no gift, inasmuch as by the indorsement of the certificate Basket "could

not have compelled the delivery of the money to him during the lifetime of the donor."

But if our preceding citations correctly define the principles governing such gifts, the delivery of a note payable to order and not indorsed, or the delivery of the bank-book without assignment, constitutes a good gift, though the money could not be collected in the lifetime of the donor.

The certificate was delivered. It represented the money which Chaney had loaned to the bank. The wording of the indorsement does not affect the question of delivery of the paper, but expresses the condition on the happening of which Basket's title to the money due by the bank should be complete.

Similar language is found in many of the cases which have been sustained as gifts *causa mortis*. Thus, in *Snelgrove* v. *Bailey*, decided by Lord Hardwicke, there was a delivery of a bond with the declaration, "In case I die, it is yours." 3 Atk. 214. "I want to deal with it in my lifetime." *Meridith* v. *Watson*, 17 Jur. 1063. In *Sessions* v. *Moseley*, decided by Chief Justice Shaw, notes were handed by payee to another to be given by him to a third after the donor's death. 4 Cush. (Mass.) 87. *Mitchell* v. *Smith*, much relied on by the other side, does not touch the question. The indorsement was not made in contemplation of death. There was no evidence to show that the testator was not in perfect health at the time of the gift. The court below held that the indorsement was sufficient to found a recovery at law. This was reversed on appeal. The same donor subsequently, in contemplation of death, and *in extremis*, handed to the defendant some mortgage deeds, saying: "I want to leave something for Christiana." "Give them to Christiana." This was held good as a gift *causa mortis*, and the report is particular to say, "that it was not sought to disturb the Vice-Chancellor's decision upon the point relating to the gift of the title-deeds." 10 L. T. N. S. 520, 801.

The condition expressed in the indorsement of the certificate is one which the law would enforce under the circumstances, if the indorsement had been absolute. *Grymes* v. *Hone*, above cited.

The rule as to checks and notes of the donor himself stands on different grounds; unless presented in the lifetime of the

drawer, they will not be paid. The question here is as to the effect of the indorsement of a note of the bank.

Mr. Asa Iglehart and *Mr. J. E. Iglehart, contra.*

MR. JUSTICE MATTHEWS, after stating the case, delivered the opinion of the court.

It is apparent that the sole controversy is between Basket and Hassell, the present parties to the appeal. By the delivery of the certificate of deposit to the clerk the attorneys of Basket are exonerated from all responsibility; and the payment of the money by the bank to Hassell equally relieves it and its officers; for, not being parties to the appeal, and the execution of the decree not having been superseded, the decree will always furnish them protection, whether affirmed or reversed, because, if reversed, it would only be so as between the parties to the appeal. So that the omitted parties have no legal interest, either in maintaining or reversing the decree, and, consequently, are not necessary parties to the appeal. *Forgay* v. *Conrad*, 6 How. 203; *Cox* v. *United States*, 6 Pet. 182; *Germain* v. *Mason*, 12 Wall. 261; *Simpson* v. *Greely*, 20 id. 152. The motion to dismiss the appeal is accordingly overruled.

It is claimed on behalf of the appellant that the delivery of the certificate under the circumstances mentioned in the statement of the case constitutes a valid *donatio mortis causa*, which entitles him to the fund; and whether it be so, is the sole question for our determination.

The general doctrine of the common law as to gifts of this character is fully recognized by the Supreme Court of Tennessee as part of the law of that State. *Richardson* v. *Adams*, 10 Yerg. 273; *Sims* v. *Walker*, 8 Humph. 503; *Gass* v. *Simpson*, 4 Cold. 288.

In the case last mentioned, that court had occasion to consider the nature of such a disposition of property, and the several elements that enter into its proper definition.

Among other things, it said: —

"A question seems to have arisen, at an early day, over which there was much contest, as to the real nature of gifts *causa mortis*. Were they gifts *inter vivos*, to take effect before the death of the donor, or were they in the nature of a legacy,

taking effect only at the death of the donor. At the termination of this contest, it seems to have been settled, that a gift *causa mortis* is ambulatory and incomplete during the donor's life, and is therefore revocable by him and subject to his debts, upon a deficiency of assets, not because the gift is testamentary or in the nature of a legacy, but because such is the condition annexed to it, and because it would otherwise be fraudulent as to creditors; for no man may give his property who is unable to pay his debts; and all now agree that it has no other property in common with a legacy. The property must pass at the time and not be intended to pass at the giver's death; yet, the party making the gift does not part with the whole interest, save only in a certain event; and until the event occurs which is to divest him, the title remains in the donor. The donee is vested with an inchoate title, and the intermediate ownership is in him; but his title is defeasible, until the happening of the event necessary to render it absolute. It differs from a legacy in this, that it does not require probate, does not pass to the executor or administrator, but is taken against and not from him. Upon the happening of the event upon which the gift is dependent, the title of the donee becomes, by relation, complete and absolute from the time of the delivery, and that without any consent or other act on the part of the executor or administrator; consequently, the gift is *inter vivos*." In another part of the opinion (p. 297) it is said: "All the authorities agree that delivery is essential to the validity of the gift, and that, it is said, is a wise principle of our laws, because delivery strengthens the evidence of the gift; and is certainly a very powerful fact for the prevention of frauds and perjury."

In the first of these extracts there is an inaccuracy of expression, which seems to have introduced some confusion, if not an apparent contradiction, when, after having stated that "the property must pass at the time and not be intended to pass at the giver's death," it is added, that "until the event occurs which is to divest him, the title remains in the donor." But a view of the entire passage leaves no room to doubt its meaning; that a *donatio mortis causa* must be completely executed, precisely as required in the case of gifts *inter vivos*, subject to be divested by the happening of any of the con-

ditions subsequent, that is, upon actual revocation by the donor, or by the donor's surviving the apprehended peril, or outliving the donee, or by the occurrence of a deficiency of assets necessary to pay the debts of the deceased donor. These conditions are the only qualifications that distinguish gifts *mortis causa* and *inter vivos*. On the other hand, if the gift does not take effect as an executed and complete transfer to the donee of possession and title, either legal or equitable, during the life of the donor, it is a testamentary disposition, good only if made and proved as a will.

This statement of the law is, we think, correctly deduced from the judgments of the highest courts in England and in this country; although, as might well have been expected, since the early introduction of the doctrine into the common law from the Roman civil law, it has developed, by new and successive applications, not without fluctuating and inconsistent decisions.

"As to the character of the thing given," says Shaw, C. J., in *Chase* v. *Redding*, 13 Gray (Mass.), 418, 420, "the law has undergone some changes. Originally it was limited, with some exactness, to chattels, to some object of value deliverable by the hand; then extended to securities transferable solely by delivery, as bank-notes, lottery tickets, notes payable to bearer or to order, and indorsed in blank; subsequently it has been extended to bonds and other choses in action, in writing or represented by a certificate, when the entire equitable interest is assigned; and in the very latest cases on the subject in this Commonwealth, it has been held that a note not negotiable, or if negotiable, not actually indorsed, but delivered, passes, with a right to use the name of the administrator of the promisee, to collect it for the donee's own use," citing *Sessions* v. *Moseley*, 4 Cush. (Mass.) 87; *Bates* v. *Kempton*, 7 Gray (Mass.), 382; *Parish* v. *Stone*, 14 Pick. (Mass.) 198.

In the case last mentioned — *Parish* v. *Stone* — the same distinguished judge, speaking of the cases which had extended the doctrine of gifts *mortis causa* to include choses in action, delivered so as to operate only as a transfer by equitable assignment or a declaration of trust, says further, that "these cases all go on the assumption that a bond, note, or other

security is a valid subsisting obligation for the payment of a sum of money, and the gift is, in effect, a gift of the money by a gift and delivery of the instrument that shows its existence and affords the means of reducing it to possession." He had, in a previous part of the same opinion, stated that "the necessity of an actual delivery has been uniformly insisted upon in the application of the rules of the English law to this species of gift." p. 204.

In *Camp's Appeal*, 36 Conn. 88, the Supreme Court of Errors of Connecticut held that a delivery to a donee of a savings-bank book, containing entries of deposits to the credit of the donor, with the intention to give to the donee the deposits represented by the book, is a good delivery to constitute a complete gift of such deposits, on the general ground that a delivery of a chose in action that would be sufficient to vest an equitable title in a purchaser is a sufficient delivery to constitute a valid gift of such chose in action, without a transfer of the legal title. That was the case of a gift *inter vivos*. But the court say, referring to the case of *Brown* v. *Brown*, 18 Conn. 410, as having virtually determined the point: "It is true that was a donation *causa mortis*, but the principle involved is the same in both cases, as there is no difference in respect to the requisites of a delivery between the two classes of gifts." And so Wilde, J., delivering the opinion of the court in *Grover* v. *Grover*, 24 Pick. (Mass.) 261, 264, expressly declared that "a gift of a chose in action, provided no claims of creditors interfere to affect its validity, ought to stand on the same footing as a sale;" that the title passed, and the gift became perfected by delivery and acceptance; that there was, therefore, "no good reason why property thus acquired should not be protected as fully and effectually as property acquired by purchase;" and showed, by a reference to the cases, that there was no difference in this respect between gifts *inter vivos* and *mortis causa*.

In respect to the opinion in this case, it is to be observed, that it cites with approval the case of *Wright* v. *Wright*, 1 Cow. (N. Y.) 598, in which it was decided that the promissory note, of which the donor himself was maker, might be the subject of a valid gift *mortis causa*, though the concurrence was not

upon that point. That case, however, has never been followed. It was expressly disapproved and disregarded by the Supreme Court of Errors of Connecticut in *Raymond* v. *Sellick*, 10 Conn. 480, Waite, J., delivering the opinion of the court; it had been expressly questioned and disapproved by Shaw, C. J., in *Parish* v. *Stone*, 14 Pick. (Mass.) 198, and was distinctly overruled by the Court of Appeals of New York in *Harris* v. *Clark*, 3 N. Y. 93. In the latter case it was said: "Gifts, however, are valid without consideration or actual value paid in return. But there must be delivery of possession. The contract must have been executed. The thing given must be put into the hands of the donee, or placed within his power by delivery of the means of obtaining it. The gift of the maker's own note is the delivery of a promise only, and not of the thing promised, and the gift therefore fails. Without delivery, the transaction is not valid as an executed gift; and without consideration, it is not valid as a contract to be executed. The decision in *Wright* v. *Wright* was founded on a supposed distinction between a gift *inter vivos* and a *donatio mortis causa*. But there appears to be no such distinction. A delivery of possession is indispensable in either case."

The case from which this extract is taken was very thoroughly argued by Mr. John C. Spencer for the plaintiff, and Mr. Charles O'Connor for the defendant, and the judgment of the court states and reviews the doctrine on the subject with much learning and ability. It was held that a written order upon a third person, for the payment of money, made by the donor, was not the subject of a valid gift, either *inter vivos* or *mortis causa;* and the rule applicable in such cases, as conceded by Mr. O'Connor, was stated by him, as follows: "'Delivery to the donee of such an instrument as will enable him, by force of the instrument itself, to reduce the fund into possession, will suffice,' is the plaintiff's doctrine. This might safely be conceded. It might even be conceded that a delivery out of the donor's control of an instrument, without which *he* could not recover the fund from his debtor or agent, would also suffice."

The same view, in substance, was taken in deciding *Hewitt* v. *Kaye*, Law Rep. 6 Eq. 198, which was the case of a check

on a banker, given by the drawer *mortis causa*, who died before it was possible to present it, and which was held not to be valid. Lord Romilly, M. R., said: "When a man on his death-bed gives to another an instrument, such as a bond, or promissory note, or an I O U, he gives a chose in action, and the delivery of the instrument confers upon the donee all the rights to the chose in action arising out of the instrument. That is the principle upon which *Amis* v. *Witt*, 33 Beavan, 619, was decided, where the donor gave the donee a document by which the bankers acknowledged that they held so much money belonging to the donor at his disposal, and it was held that the delivery of that document conferred upon the donee the right to receive the money. But a cheque is nothing more than an order to obtain a certain sum of money, and it makes no difference whether the money is at a banker's or anywhere else. It is an order to deliver the money, and if the order is not acted upon in the lifetime of the person who gives it, it is worth nothing."

Accordingly the Vice-Chancellor, *In re Beak's Estate*, Law Rep. 13 Eq. 489, refused to sustain as valid the gift of a check upon a banker, even although its delivery was accompanied by that of the donor's pass-book.

The same rule, as to an unpaid and unaccepted check, was followed in *The Second National Bank of Detroit* v. *Williams*, 13 Mich. 282. The principle is that a check upon a bank account is not of itself an equitable assignment of the fund. *Bank of the Republic* v. *Millard*, 10 Wall. 152; but if the banker accepts the check, or otherwise subjects himself to liability as a trustee, prior to the death of the donor, the gift is complete and valid. *Bromley* v. *Brunton*, Law Rep. 6 Eq. 275.

Contrary decisions have been made in respect to donations *mortis causa* of savings-bank books, some courts holding that the book itself is a document of title, the delivery of which, with that intent, is an equitable assignment of the fund. *Pierce* v. *Boston Savings Bank*, 129 Mass. 425; *Hill* v. *Stevenson*, 63 Me. 364; *Tillinghast* v. *Wheaton*, 8 R. I. 536. The contrary was held in *Ashbrook* v. *Ryon*, 2 Bush (Ky.), 228, and in *McGonnell* v. *Murray*, Irish Rep. 3 Eq. 460.

That a delivery of a certificate of deposit, such as that de-

scribed in the record in this case, might constitute a valid *donatio mortis causa*, does not admit of doubt. It was so decided in *Amis* v. *Witt*, 33 Beav. 619; *Moore* v. *Moore*, Law Rep. 18 Eq. 474; *Hewitt* v. *Kaye*, 6 id. 198; *Westerlo* v. *De Witt*, 36 N. Y. 340. A certificate of deposit is a subsisting chose in action and represents the fund it describes, as in cases of notes, bonds, and other securities, so that a delivery of it, as a gift, constitutes an equitable assignment of the money for which it calls.

The point, which is made clear by this review of the decisions on the subject, as to the nature and effect of a delivery of a chose in action, is, as we think, that the instrument or document must be the evidence of a subsisting obligation and be delivered to the donee, so as to vest him with an equitable title to the fund it represents, and to divest the donor of all present control and dominion over it, absolutely and irrevocably, in case of a gift *inter vivos*, but upon the recognized conditions subsequent, in case of a gift *mortis causa;* and that a delivery which does not confer upon the donee the present right to reduce the fund into possession by enforcing the obligation, according to its terms, will not suffice. A delivery, in terms, which confers upon the donee power to control the fund only after the death of the donor, when by the instrument itself it is presently payable, is testamentary in character, and not good as a gift. Further illustrations and applications of the principle may be found in the following cases: *Powell* v. *Hellicar*, 26 Beav. 261; *Reddel* v. *Dobree*, 10 Sim. 244; *Farquharson* v. *Cave*, 2 Colly. C. C. 356; *Hatch* v. *Atkinson*, 56 Me. 324; *Bunn* v. *Markham*, 7 Taunt. 224; *Coleman* v. *Parker*, 114 Mass. 30; *Wing* v. *Merchant*, 57 Me. 383; *Mc Willie* v. *Van Vacter*, 35 Miss. 428; *Egerton* v. *Egerton*, 17 N. J. Eq. 419; *Michener* v. *Dale*, 23 Pa. St. 59.

The application of these principles to the circumstances of the present case requires the conclusion that the appellant acquired no title to the fund in controversy, by the indorsement and delivery of the certificate of deposit. The certificate was payable on demand; and it is unquestionable that a delivery of it to the donee, with an indorsement in blank, or a special indorsement to the donee, or without indorsement, would have transferred the whole title and interest of the donor in the fund

represented by it, and might have been valid as a *donatio mortis causa*. That transaction would have enabled the donee to reduce the fund into actual possession, by enforcing payment according to the terms of the certificate. The donee might have forborne to do so, but that would not have affected his right. It cannot be said that obtaining payment in the lifetime of the donor would have been an unauthorized use of the instrument, inconsistent with the nature of the gift; for the gift is of the money, and of the certificate of deposit, merely as a means of obtaining it. And if the donee had drawn the money, upon the surrender of the certificate, and the gift had been subsequently revoked, either by the act of the donor or by operation of law, the donee would be only under the same obligation to return the money, that would have existed to return the certificate, if he had continued to hold it, uncollected.

But the actual transaction was entirely different. The indorsement, which accompanied the delivery, qualified it, and limited and restrained the authority of the donee in the collection of the money, so as to forbid its payment until the donor's death. The property in the fund did not presently pass, but remained in the donor, and the donee was excluded from its possession and control during the life of the donor. That qualification of the right, which would have belonged to him if he had become the present owner of the fund, establishes that there was no delivery of possession, according to the terms of the instrument, and that as the gift was to take effect only upon the death of the donor, it was not a present executed gift *mortis causa*, but a testamentary disposition. The right conferred upon the donee was that expressed in the indorsement; and that, instead of being a transfer of the donor's title and interest in the fund, as established by the terms of the certificate of deposit, was merely an order upon the bank to pay to the donee the money called for by the certificate, upon the death of the donor. It was, in substance, not an assignment of the fund on deposit, but a check upon the bank against a deposit, which, as is shown by all the authorities and upon the nature of the case, cannot be valid as a *donatio mortis causa*, even where it is payable *in presenti*, unless paid or accepted

while the donor is alive; how much less so, when, as in the present case, it is made payable only upon his death.

The case is not distinguishable from *Mitchell* v. *Smith*, 4 De G., J. & S. 422, where the indorsement upon promissory notes, claimed as a gift, was, "I bequeath — pay the within contents to Simon Smith, or his order, at my death." Lord Justice Turner said: "In order to render the indorsement and delivery of a promissory note effectual they must be such as to enable the indorsee himself to indorse and negotiate the note. That the respondent, Simon Smith, could not have done here during the testator's life." It was accordingly held that the disposition of the notes was testamentary and invalid.

It cannot be said that the condition in the indorsement, which forbade payment until the donor's death, was merely the condition attached by the law to every such gift. Because the condition, which inheres in the gift *mortis causa*, is a subsequent condition, that the subject of the gift shall be returned if the gift fails by revocation; in the mean time the gift is executed, the title has vested, the dominion and control of the donor has passed to the donee. While here, the condition annexed by the donor to his gift is a condition precedent, which must happen before it becomes a gift, and, as the contingency contemplated is the donor's death, the gift cannot be executed in his lifetime, and, consequently, can never take effect.

This view of the law was the one taken by the Circuit Court as the basis of its decree, in which we accordingly find no error. It is, accordingly,

Affirmed.

MR. JUSTICE MILLER did not sit in this case, nor take any part in deciding it.

BARBER v. SCHELL.

SCHELL v. BARBER.

1. By schedule D of the act of July 30, 1846, c. 74, a duty of twenty-five per cent *ad valorem* was imposed on "cotton laces, cotton insertings," and "manufactures composed wholly of cotton, not otherwise provided for." By sect. 1 of the act of March 3, 1857, c. 98, the duties on the articles enumerated in schedules C and D of the act of 1846 were fixed at twenty-four and nineteen per cent, respectively, "with such exceptions as are hereinafter made." By sect. 2 of the act of 1857, "all manufactures composed wholly of cotton, which are bleached, printed, painted, or dyed, and delaines," were transferred to schedule C. *Held*, that laces and insertings composed wholly of cotton, and bleached or dyed, were dutiable at twenty-four per cent, under the act of 1857.
2. The designations qualified by the word "cotton," in the act of 1846, are designations of articles by special description, as contradistinguished from designations by a commercial name or a name of trade, and are designations of quality and material.
3. Under the act of March 2, 1799, c. 23, the collector of customs is not entitled to a fee for putting on an invoice a stamp or certificate as to the presentation of the invoice, or for an oath to an entry or for a jurat to such oath, or for his order to the storekeeper to deliver examined packages.

ERROR to the Circuit Court of the United States for the Southern District of New York.

The facts are stated in the opinion of the court.

The Solicitor-General for Schell.

Mr. George Bliss, contra.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a suit commenced in 1863, by the members of the firm of S. Cochran & Co., against the collector of the port of New York. As tried in the Circuit Court it involved the recovery back of duties paid on cotton laces and cotton insertings imported from abroad in 1857, 1858, 1859, 1860, and 1861, and of fees paid at the custom-house. The laces and insertings were composed wholly of cotton, and were "either bleached or dyed." The collector charged a duty on them of twenty-four per cent *ad valorem*, the importers claiming that the proper duty was nineteen per cent *ad valorem*. At the trial the court

instructed the jury that the duty was correctly assessed and that the plaintiffs could not recover.

The question as to the fees involved four items. On the presentation of an invoice and an entry, the collector, before he would receive them as collector, impressed on each invoice, for the convenience and security of himself and the government, a stamp or certificate, certifying in the name of a deputy collector that the invoice was presented "on entry" on such a day. On each entry, one of the plaintiffs was required to make and subscribe before the collector or his deputy the owner's or consignee's oath. For each of such stamps the collector exacted twenty cents, and for each of such oaths twenty cents. He also exacted a fee of twenty cents for each permit to land the merchandise embraced in each entry on which the duties had been paid or secured, such permit being signed by the collector and the naval officer. Said three fees of twenty cents were paid with the duties, and otherwise no permit for the landing and delivery of the goods could be obtained. The permit to land covered all the goods embraced in the entry; but at least one package of each invoice, and one package in every ten packages of each invoice, were, by order of the collector, designated on each invoice, and each entry, and also on the permit, to be sent, and were sent, to the public store for examination and appraisement; and, after they had been examined and appraised and reported on, an order was required by the plaintiffs' firm, signed by the collector alone, to the storekeeeper, to deliver such examined packages to the plaintiffs' firm. For every such order, without which the examined packages could not be obtained, the collector exacted a fee of twenty cents. At the trial, the plaintiffs conceded that the fee for the permit was legal. The court directed a verdict for the plaintiffs for the amounts exacted for the other three fees, with interest, being $1,734.80, and, after a judgment for the plaintiffs therefor, with costs, the plaintiffs sued out a writ of error based on their failure to recover the alleged excess of duty exacted on the laces and insertings, and the defendant sued out a writ of error based on the recovery for the three alleged illegal fees.

By schedule D of the act of July 30, 1846, c. 74, a duty of twenty-five per cent *ad valorem* was imposed on "cotton laces,

cotton insertings, cotton trimming laces, cotton laces and braids," and "manufactures composed wholly of cotton, not otherwise provided for."

By sect. 1 of the act of March 3, 1857, c. 98, it was enacted that after July 1, 1857, *ad valorem* duties should be imposed in lieu of those then imposed on imported goods, as follows: "Upon the articles enumerated in schedules A and B" of the tariff act of 1846, a duty of thirty per cent, "and upon those enumerated in schedules C, D, E, F, G, and H of said act," the duties of twenty-four, nineteen, fifteen, twelve, eight, and four per cent, respectively, "with such exceptions as are hereinafter made." The schedules above mentioned respectively imposed duties of one hundred, forty, thirty, twenty-five, twenty, fifteen, ten, and five per cent.

Thus far cotton laces and cotton insertings, being in schedule D of the act of 1846 at twenty-five per cent, were reduced by the act of 1857, with the other articles in schedule D, to nineteen per cent. But sect. 2 of the act of 1857 provided "that all manufactures composed wholly of cotton, which are bleached, printed, painted, or dyed, and delaines, shall be transferred to schedule C." Under this provision it would seem very plain that the goods in the present case were subject to a duty of twenty-four per cent, and not of nineteen per cent. If sect. 1 of the act of 1857 had merely reduced from twenty-five per cent to nineteen per cent the duty on the articles specially mentioned in schedule D of the act of 1846, without exception, the duty on the goods in question would have been reduced to nineteen per cent. But the enactment was distinct that there should be excepted out of the reduction "all manufactures composed wholly of cotton, which are bleached, printed, painted, or dyed, and delaines," and that they should go into schedule C, the twenty-four per cent schedule.

The contention for the plaintiffs is, that as cotton laces and cotton insertings were made dutiable by those names in the act of 1846, they are not to be affected by the subsequent general provision as to manufactures composed wholly of cotton.

Schedule C of the act of 1846 imposed a duty of thirty per cent on "cotton cords, gimps and galloons," and on "manufactures of cotton, . . . if embroidered or tamboured in the loom,

or otherwise, by machinery, or with the needle, or other process." Schedule E imposed a duty of twenty per cent on "caps, gloves, leggins, mits, socks, stockings, wove shirts and drawers, made on frames, composed wholly of cotton, worn by men, women, and children," and on "velvet, in the piece, composed wholly of cotton." These provisions, and the one in schedule D as to cotton laces, &c., relate to goods made of cotton entirely. Those goods are all of them goods to which, as "manufactures composed wholly of cotton," sect. 2 of the act of 1857 applies, transferring them, when bleached, printed, painted, or dyed, to the twenty-four per cent schedule, schedule C. The duty on them had been thirty, twenty-five, and twenty per cent respectively. But for such transfer the new duty on those in schedules D and E would have been nineteen and fifteen. A new uniform rate of twenty-four was imposed, and while the thirty was reduced by six per cent, the twenty-five was reduced by only one, and the twenty was increased by four. This indicates an intention, in the act of 1857, to impose, in general, on manufactures composed wholly of cotton, when bleached, printed, painted, or dyed, a relatively higher duty as compared with other articles named in the act of 1846.

The expression "manufactures composed wholly of cotton" is not found in the act of 1846. It is in that act qualified by the words "not otherwise provided for." In the act of 1857 the expression is, "all manufactures composed wholly of cotton, which are bleached," &c. If the words "manufactures composed wholly of cotton," unqualified, and the words "cotton laces" and "cotton insertings," had all of them been found in the act of 1846, as the general expression would not have embraced the specific terms in that act, for dutiable purposes, though including them in general language, it would be reasonable to say that the general expression in a later act would not include the specific terms for dutiable purposes. But the fact that the general expression, as used in schedule D of the act of 1846, is qualified by the words "not otherwise provided for," shows that there were manufactures composed wholly of cotton otherwise provided for, that is, in other items in that act. Thus, besides the embroidered and tamboured manufactures of cotton provided for in schedule C of that act, there are cords,

gimps, galloons, laces, insertings, trimming laces, laces and braids, each with the word "cotton" prefixed, indicating manufactures composed wholly of cotton, and there are also the articles composed wholly of cotton named in schedule E. The material "cotton" is the thing of special mark, as the sole material in the manufacture. In this view it cannot properly be said that these manufactured articles, manufactures of cotton composed wholly of cotton, designated in the act of 1846 always by the epithet "cotton" applied to them, are not embraced, for dutiable purposes, in the terms "all manufactures composed wholly of cotton," in sect. 2 of the act of 1857.

The designations qualified by the word "cotton," in the act of 1846, are designations of articles by special description, as contradistinguished from designations by a commercial name or a name of trade. They are designations of quality and material. The articles referred to, named in schedules C, D, and E of the act of 1846, are all of them manufactures wholly of cotton; but under that act they were not all subject to the same duty, and so that act designates them substantially as manufactures wholly of cotton which are gimps at thirty per cent, manufactures wholly of cotton which are laces or insertings at twenty-five per cent, manufactures wholly of cotton which are stockings, made on frames and worn by human beings, at twenty per cent, and so on. But for the exceptions provided for by sect. 1 of the act of 1857 the duties on those articles, if bleached, printed, painted, or dyed, would have been reduced to twenty-four, nineteen, and fifteen per cent, respectively; but sect. 2 of that act says, in substance, that manufactures wholly of cotton which are gimps, or laces, or insertings, or stockings, and so on, shall, all of them, be subject to twenty-four per cent duty. This was the view applied by Mr. Justice Nelson, in *Reimer* v. *Schell*, 4 Blatchf. 328, in 1859, to colored cotton hosiery, under the provisions in question, and we think it a sound one. It was the view adopted by the Circuit Court in this case. There is no question of commercial designation. Hence, the cases cited and relied on by the importers are not in their favor.

Homer v. *The Collector*, 1 Wall. 486, in 1863, was a case in which Mr. Justice Nelson delivered the opinion of this court.

It was a case under these same statutes. Almonds were dutiable, by that name, at forty per cent, in schedule B of the act of 1846. Under the act of 1857 the duty on the articles in said schedule B was reduced to and fixed at thirty per cent, and the collector exacted that duty on almonds. It was contended that as, by sect. 2 of the latter act, "fruits, green, ripe, or dried," were transferred to schedule G, and so made subject to only eight per cent duty, almonds were so transferred, as being "fruits, green, ripe, or dried." An attempt was made, at the trial, to show that, at the time the act of 1857 was passed, almonds were fruit, green, ripe, or dried, according to the commercial understanding of those terms in the markets of this country, and questions were certified to this court, on a division of opinion in the Circuit Court, as to the proper duty on almonds, and as to the admissibility of such evidence. It was contended, for the importer, that the term "dried fruits," in popular meaning, included almonds. The government claimed that the term "almonds" was a specific name, and, therefore, commercial nomenclature had no application. This court held that inquiry as to whether, in a commercial sense, almonds were dried fruit, had nothing to do with the question, as a duty had been imposed on almonds, *eo nomine*, almost immemorially; and that, as almonds were charged specifically with a duty of forty per cent in the act of 1846, and were not named as almonds in the changes in the act of 1857, and full effect could be given to the term "fruit, dried," without including almonds in it, it followed that almonds were dutiable at thirty per cent. There is nothing in this decision that overrules that in *Reimer* v. *Schell*, or that aids the importers in the present case. The act of 1846, in substance, mentions manufactures wholly of cotton which are laces or insertings, bleached or dyed, and sect. 2 of the act of 1857 mentions them in naming manufactures composed wholly of cotton, bleached or dyed.

Nor does the case of *Reiche* v. *Smythe*, 13 Wall. 162, as to birds, apply. That case was decided on the ground that the word "animals," in the act of 1861, did not include "birds," and so could not include them in the act of 1866.

There is nothing in *Smythe* v. *Fiske*, 23 id. 374, or in *Arthur* v. *Morrison*, 96 U. S. 108, which applies to this case.

Movius v. *Arthur*, 95 U. S. 144, was decided on the same view as *Homer* v. *The Collector*. "Patent leather" had been dutiable by that name in the acts of 1861 and 1862. The act of 1872 imposed a less duty on "skins dressed and finished, of all kinds." This court held that patent leather continued subject to the former duty, on the view that, although patent leather was a finished skin, something was done to it after it could be called a finished skin to make patent leather of it, and that it could not have been intended to include patent leather in the general designation of "finished skins."

In *Arthur* v. *Lahey*, 96 id. 112, the subject of duty was laces, manufactures of silk, on which a duty of sixty per cent was exacted, under the act of 1864, as "silk laces." It was contended that they were dutiable at thirty per cent, as "thread laces," under the act of 1861, as amended by the act of 1862. The question being submitted to the jury whether they were commercially known as "thread laces," although made of silk, it was found that they were, and the plaintiffs had a verdict. This court held that the question was one of commercial designation, and that the prior specific designation of "thread laces" must prevail over the words "silk laces," it appearing that there were thread laces of cotton and thread laces of silk, and articles commercially known as silk laces, the designation of "thread lace" depending on the mode of manufacture. The principle of that case, and of kindred cases, such as *Arthur* v. *Rheims*, id. 143, is, that the specific designation of an article by a commercial name will prevail over a general term in a later act, and has no application to the present case, which is not, as to cotton laces and cotton insertings, one of designation by a commercial name.

The bill of exceptions in the present case states that previously to about 1879 there were no cotton laces printed or dyed, and that from 1850 to 1861 there were many goods composed wholly of cotton, and bleached, printed, painted, colored, or dyed, such as calicoes (prints), lawns, handkerchiefs, velvets, and velveteens, and cotton piece-goods generally. If, when sect. 2 of the act of 1857 was enacted, the words "printed" and "painted" were not applicable to laces, it does not follow that the provision is to be limited to such cotton articles as

were then printed or painted as well as bleached or dyed. It includes any article which, as then known, satisfied any one of the conditions.

We see no warrant for the view that the act of 1857 applies only to piece goods.

It results from these views that the goods in question were subject to the duty imposed.

As to the three disputed fees, we are of opinion that they were none of them allowed by the law in force, sect. 2 of the act of March 2, 1799, c. 23.

The stamp or certificate on the invoice was one for the convenience and security of the collector and the government, and was not an "official certificate," in the sense of the statute. It was not an official document required by the merchant, nor was it given to him. It was a memorandum between officers in the custom-house, as a part of their system of checks and authentications.

The fee for the oath to the entry, as a fee for its administration, was not named in the statute. As a fee for the jurat to the oath, although the oath was required by the statute, and its form was prescribed, and it was to be taken before the collector, the jurat was not an official document required by the merchant or given to him.

The bill of exceptions states that the order to the storekeeper to deliver examined packages was an order required by the plaintiffs' firm from the collector. But we do not think it was an official certificate, or an official document required by the merchant, in the sense of the statute. The permit to land the goods having been issued and paid for, and the duties paid or secured, it was the duty of the officers of the customs to deliver the goods, when examined. The order to the storekeeper was a memorandum between officers. It was "required" by the merchant, in one sense, because, without it, according to the course of business, the storekeeper would not deliver the examined packages, but it was not an official document passing from the custom-house to the merchant.

Judgment affirmed.

SCHELL v. COCHRAN.

COCHRAN v. SCHELL.

1. Where a collector of customs brings a writ of error to review a judgment recovered against him for moneys exacted by and paid to him on entries, this court will, if it affirms the judgment, allow interest on it, under rule 23.
2. In such a case, the "final judgment," the amount whereof is payable under sect. 989 of the Revised Statutes, is that rendered by the court below pursuant to the mandate of this court.

ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is stated in the opinion of the court.

The Solicitor-General for Schell.

Mr. George Bliss, contra.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

These writs of error were brought to review a judgment rendered by the Circuit Court of the United States for the Southern District of New York, Oct. 14, 1882, *nunc pro tunc* as of Oct. 7, 1882, in favor of Thomas Cochran and William Barber, surviving partners of S. Cochran & Co., against Augustus Schell, late collector of customs, for the sum of $1,892.83, composed of $1,734.80 damages and $158.03 costs. The damages were for excessive fees exacted at the custom-house on entries, and the writ of error brought by Schell was brought to review the judgment in respect to the recovery for such fees. The writ of error brought by S. Cochran & Co. was based on their failure to recover in the suit for duties paid under protest. The writs of error were heard together at this term and the judgment was affirmed, the recovery for the fees and the failure to recover for the duties being both of them sustained. The judgment of this court, as set forth in the mandate, was rendered March 19, and covered both writs of error, and directed that the judgment of the Circuit Court be affirmed, "with interest until paid, at the same rate per annum that similar judgments bear in the courts of the State of New

York." The mandate was sent to the court below on the 4th of April, and now the Solicitor-General, representing the United States, moves, on behalf of Schell, to correct the judgment and the mandate by striking out the direction as to interest, so that the judgment rendered Oct. 14, 1882, shall not carry interest up to the time a new judgment is rendered by the court below on the mandate.

This application appears to be based on the construction given to a decision made by the Circuit Court for the Southern District of New York, in January, 1882, in *White* v. *Arthur*, 20 Blatchf. 237. That was a suit against a collector of customs to recover duties paid, in which the Circuit Court rendered a judgment for the plaintiffs, March 1, 1881, for $2,295.90, and where at the trial of the action the court had made a certificate of probable cause, under sect. 989 of the Revised Statutes. The judgment being presented for payment out of the treasury, under that section, the amount of the face of it was paid, without any interest on it after its rendition. The court being applied to by the attorney for the United States to direct satisfaction of the judgment to be entered of record, it was held that the government was not liable for any interest on the amount of the judgment after its entry. This decision was founded on a consideration of the statutory provisions on the subject of the payment out of the treasury of the amount of a judgment recovered against a collector of customs or other officer of the revenue, for money paid to him and by him paid into the treasury in the performance of his official duty, where a certificate of probable cause is granted. The result reached was that, under the language of sect. 8 of the act of June 14, 1878, c. 191, sect. 1 of the act of March 3, 1879, c. 183, sect. 1 of the act of June 16, 1880, c. 234, sect. 1 of the act of March 3, 1881, c. 132, interest accruing after the entry of such a judgment, on its amount, or on the money so paid to the officer, is not to be paid by the government; and that, under sect. 989, the officer is not personally liable for such interest.

This court has never made any decision on the points thus ruled on in *White* v. *Arthur*. The case of *Erskine* v. *Van Arsdale*, 15 Wall. 75, was a suit to recover back an internal revenue tax illegally exacted. The court below had instructed

the jury that they might, in their verdict, add interest to the tax paid. This court held that instruction to be correct, but the only decision was that interest might be added from the time of the illegal exaction to the verdict. Nothing was decided as to interest on the judgment when the government should come to pay it. The interest included in the verdict is put in before there is any certificate of probable cause, and, if there is no such certificate, the government assumes no part of the liability of the defendant.

In *United States* v. *Sherman*, 98 U. S. 565, all that was decided was that there must be a certificate of probable cause, under sect. 989, before the liability of the government to pay a judgment against a revenue officer can attach, and that, where a certificate of probable cause is made after the judgment is rendered, the government is not liable for the interest which accrues on the judgment before the making of the certificate. In that case the government had voluntarily paid the interest which accrued after the making of the certificate.

It is provided by sect. 1010 of the Revised Statutes, that "where, upon a writ of error, judgment is affirmed in the Supreme Court, or a Circuit Court, the court shall adjudge to the respondent in error just damages for his delay." Rule 23 of this court provides that where a judgment is affirmed on a writ of error, "the interest shall be calculated and levied from the date of the judgment below, until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered." This statute and rule, and the practice under them, followed in the mandate in the present case, of allowing interest on the affirmance of a judgment where a collector is plaintiff in error, were urged by the counsel for the defendant in *White* v. *Arthur*, as showing that in that case interest on the judgment should be paid; but the court held that such practice could not affect the question there raised, because the allowance of such interest belonged solely to the putting the judgment in shape, as one in a private suit.

The interest allowed in the present case, in the judgment of this court, was allowed under rule 23, which, in its provisions as to interest, is in harmony with sect. 966 of the Revised

Statutes, originally enacted as sect. 8 of the act of Aug. 23, 1842, c. 188. Such interest, for the time a writ of error is pending, is really damages for delay. When the mandate of this court goes to the court below, it is necessary that that court, with a view to execution, should enter a further judgment in accordance with the mandate, covering the direction of this court as to interest and as to costs in this court on the writ of error. A writ of error in a case of this kind, being brought by direction of a department of the government, operates as a *supersedeas*, under sects. 1000 and 1001 of the Revised Statutes, without any bond to answer in damages being given. The plaintiff in the judgment being stayed as to execution while the case is in this court, and there being a new judgment rendered by this court in the suit, "the final judgment" referred to in sect. 989 is the judgment as it stands after its affirmance by this court, and after the court below has rendered such judgment as the mandate of this court requires. Therefore, the interest allowed in this case is interest before final judgment, and is of the same character as the interest allowed before judgment in a suit against a collector where there is no writ of error. In both cases, when there is a final judgment, the principle applies, declared by this court in *Erskine* v. *Van Arsdale*, *ubi supra*, that it is to be presumed the government is always ready and willing to pay its ordinary debts. But, where there is a judgment and a certificate of probable cause, and thus a case for payment out of the treasury under sect. 989, and then, by direction of the government, a writ of error is taken which operates as a stay, interest on the judgment during the stay ought to be allowed, and the statutes not only do not forbid such allowance, but permit it. The expression "interest and costs in judgment cases," in the appropriation bills before referred to, clearly includes the interest in the present case, it being interest before final judgment.

Application denied.

SCHELL *v.* DODGE.

BARNEY *v.* ISLER.

BARNEY *v.* COX.

BARNEY *v.* FRIEDMAN.

Where a cause has been finally disposed of here, by the dismissal of the writ of error, this court has no power, at a subsequent term, to alter its judgment to one of affirmance, although, if there had been a judgment of affirmance, interest during the pendency of the writ would have been allowed on the amount of the judgment below, and in the judgment of dismissal no such interest was allowed.

ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is stated in the opinion of the court.

The Solicitor-General for Schell and Barney.

Mr. John E. Parsons, contra.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

These are all suits in each of which a judgment was rendered against a late collector of customs for the recovery of money paid as duties. There has been a certificate of probable cause in each. A writ of error in each case was brought here by direction of the government. When the cases were reached in order on the docket of this court at October Term, 1881, the Solicitor-General, on the part of the government, moved that the writs of error be dismissed, as presenting no question which he desired to argue. This was done. There was no affirmance of the judgments below, and the judgments and mandates of this court contained no direction as to interest on the judgments below during the time the writs of error were pending. Those judgments were rendered in 1878, and suspended by the writs of error for over three years. In the Dodge case the mandate was issued, but has never been presented to the court below. In the other cases, the mandates were issued

and presented to the court below, and orders for judgment were entered thereon. Counsel for the defendants in error in the Dodge case were present in this court when that case was so dismissed, but in the other cases no counsel for the defendants in error was present, and the motions to dismiss were made without their knowledge, and the mandates were not issued till after the close of the term.

The defendants in error now apply to this court to correct the judgments and mandates in these cases, so as to award to them interest as such or as damages for delay. There is no doubt that, if the defendants in error in these cases had in season asked for judgments of affirmance, their applications would have been granted, and interest would have been allowed, in accordance with the decision in *Schell* v. *Cochran*, *ante*, p. 625. But the difficulty now is that we have no power to vary the judgments or the mandates, after the close of the term, no especial right to do so in these cases having been reserved. It has always been held by this court that it has no power, after the term has passed, and a cause has been dismissed or otherwise finally disposed of here, to alter its judgment in such a particular as that now asked for, the change of a dismissal of a writ of error, with its legal consequences, to an affirmance of the judgment below, with its legal consequences, and not an error of mere form, or a clerical error, or a misprision of the clerk, or the like. *Jackson* v. *Ashton*, 10 Pet. 480; *Bank of the United States* v. *Moss*, 6 How. 31, 38.

Applications denied.

HILL v. HARDING.

A State court, in which an action against a bankrupt upon a debt provable in bankruptcy is pending, must, on his application under sect. 5106 of the Revised Statutes, stay all proceedings to await the determination of the court in bankruptcy on the question of his discharge, unless unreasonable delay on his part in endeavoring to obtain his discharge is shown, or the court in bankruptcy gives leave to proceed to judgment for the purpose of ascertaining the amount due; even if an attachment has been sued out in the action more than four months before the commencement of the proceedings in bankruptcy, and has been dissolved by giving bond with sureties to pay the amount of the judgment which might be recovered. And if the highest court of the State denies the application, and renders final judgment against the bankrupt, he may, although he has since obtained his certificate of discharge, bring a writ of error, and his assignee may be heard here in support of the writ.

ERROR to the Supreme Court of the State of Illinois.

The case is stated in the opinion of the court.

Mr. George W. Brandt for the plaintiff in error.

Mr. Adolph Moses for the defendant in error.

MR. JUSTICE GRAY delivered the opinion of the court.

The material facts, as appearing by the record of this case in the Supreme Court of Illinois, are as follows: —

On the 16th of March, 1877, the original plaintiffs, in accordance with the statutes of Illinois, and upon the affidavit of one of them that the defendant was indebted to them in the sum of $8,264 for services as attorneys at law, and that he was a resident of Illinois, and was about fraudulently to conceal, assign or otherwise dispose of his property or effects so as to hinder or delay his creditors, sued out from the Circuit Court of Cook County a writ of attachment against him, upon which his real estate was attached. On the 28th of March, 1877, in accordance with those statutes, he dissolved the attachment by giving bond with sureties to pay to the plaintiffs, within ninety days after judgment, the amount of any judgment which might be rendered against him on a final trial in the suit. On the 12th of April, 1878, a verdict was returned for the plaintiffs in the sum of $3,500, and the defendant moved the court to set it aside and grant a new trial. On the 7th of May, 1878, he

filed in the cause a duly attested copy of an order, dated the 1st of May, 1878, adjudging him a bankrupt under the Bankrupt Act of the United States.

On the 11th of May, 1878, before judgment on the verdict, the defendant suggested the adjudication in bankruptcy (which was admitted) and applied to the State court, under sect. 5106 of the Revised Statutes, for a stay of proceedings to await the determination of the court in bankruptcy upon the question of his discharge. On the same day, the court denied this application, as well as the motion for a new trial, and rendered judgment against him on the verdict, and afterwards allowed a bill of exceptions, which stated the facts above recited. That judgment was affirmed by the Appellate Court for the First District of Illinois on the 19th of November, 1878, and by the Supreme Court of Illinois on the 18th of November, 1879. The opinion of the Supreme Court is reported in 93 Illinois, 77. On the 6th of January, 1880, the defendant sued out this writ of error.

At October Term 1880 of this court, the defendants in error moved to dismiss the writ of error, because at the time it was sued out the plaintiff in error had been discharged from the obligation of the debt to them; and the assignee in bankruptcy moved to substitute his name for that of the bankrupt as plaintiff in error. By the papers submitted with these motions, it appeared that the assignment in bankruptcy was made on the 17th of June, 1878, and a certificate of discharge granted to the bankrupt on the 15th of September, 1879. The court overruled both motions; but granted leave to the assignee to be heard by counsel at the argument on the merits, as to all matters affecting the estate of the bankrupt.

The record clearly shows that a privilege under sect. 5106 of the Revised Statutes was claimed by the original defendant, and was denied by the highest court of the State. There can therefore be no doubt of the authority of this court to revise the judgment.

The section in question is as follows: "No creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been

determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge; provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge; and provided also that, if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed."

The terms of this enactment are as broad and as peremptory as possible. "No creditor whose debt is provable shall be allowed to prosecute to final judgment" any suit thereon against the bankrupt; and such suit "shall, upon the application of the bankrupt, be stayed." This provision, like all laws of the United States made in pursuance of the Constitution, binds the courts of each State, as well as those of the nation. Upon the application of the bankrupt to the court, State or national, in which the suit is pending, it is the duty of that court to stay the proceedings "to await the determination of the court in bankruptcy on the question of the discharge," unless there is unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, or unless, the amount of the debt being in dispute, the United States court sitting in bankruptcy gives leave to proceed to judgment for the purpose of ascertaining that amount. If neither the bankrupt nor his assignee in bankruptcy applies for a stay of proceedings, the court may of course proceed to judgment. *Doe* v. *Childress*, 21 Wall. 642; *Eyster* v. *Gaff*, 91 U. S. 521; *Norton* v. *Switzer*, 93 id. 355.

The stay does not operate as a bar to the action, but only as a suspension of proceedings until the question of the bankrupt's discharge shall have been determined in the United States court sitting in bankruptcy. After the determination of that question in that court, the court in which the suit is pending may proceed to such judgment as the circumstances of the case may require. If the discharge is refused, the plaintiff, upon establishing his claim, may obtain a general judgment. If the discharge is granted, the court in which the suit is pending may then determine whether the plaintiff is entitled to a special

judgment for the purpose of enforcing an attachment made more than four months before the commencement of the proceedings in bankruptcy, or for the purpose of charging sureties upon a bond given to dissolve such an attachment. But, so long as the question of the discharge in bankruptcy is undetermined, the suit cannot, against the objection of the bankrupt or of his assignee in bankruptcy, proceed for any purpose, except in one of two events, an unreasonable delay of the bankrupt in endeavoring to obtain his discharge, or an order of the court in bankruptcy granting leave to proceed for the single purpose of ascertaining the amount due.

The result required by the very words of the statute is confirmed by a consideration of the reasons upon which it rests. Its purpose is not merely to protect the bankrupt, in case he obtains a certificate of discharge, from having the original cause of action against him merged in a judgment, the right of action upon which might not be barred by the discharge; but to prevent him, so long as the question of his discharge is undetermined, from being harassed by suit upon any debt provable in bankruptcy, whether it would or would not be barred by a certificate of discharge, and whether the attachment or other security obtained in the suit would or would not be affected by the proceedings in bankruptcy; and also to afford to the assignee in bankruptcy, to whom all the property of the bankrupt has passed, opportunity to assume the defence of the suit, and to contest the existence and amount of the plaintiff's claim, and the validity of his attachment.

This view, which is supported alike by the words and by the reason of the statute, is in accordance with the preponderance of decisions in the highest courts of the several States, and in the District Courts of the United States, as shown by the cases cited in argument.[1]

The plaintiffs' debt being provable in bankruptcy, no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge being shown, and the court in bankruptcy

[1] *Metcalf's Case*, 2 Benedict, 78; *Rosenberg's Case*, 3 id. 14; *Penny* v. *Taylor*, 10 Bankr. Reg. 200; *Whitney's Case*, 18 id. 563; *Ray* v. *Wight*, 119 Mass. 426; *National Bank of Clinton* v. *Taylor*, 120 id. 124; *Towne* v. *Rice*, 122 id. 67; *Page* v. *Cole*, 123 id. 93; *Seavey* v. *Beckler*, 128 id. 471; *McKay* v. *Funk*, 37 Iowa, 661; *Bratton* v. *Anderson*, 5 S. C. 504; *Cohen* v. *Duncan*, 64 Ga. 341.

having granted no leave to proceed to judgment for the purpose of ascertaining the amount due, the decision of the State court, denying the application, made by the bankrupt before judgment, for a stay of proceedings to await the determination of the question of his discharge, and rendering a general judgment against him, was erroneous, and he had the right to sue out and prosecute a writ of error to reverse it. The assignee in bankruptcy has also been permitted to be heard in support of the writ of error, because of his authority and duty to defend the estate of the bankrupt against claims and attachments which he believes to be invalid.

The result is that the judgment of the Supreme Court of Illinois must be reversed, and the case remanded to that court for further proceedings in conformity with this opinion.

The judgment of the State court being reversed for the reason that it denied the stay of proceedings to which the original defendant was entitled under the provision of the Bankrupt Act until the question of his discharge in bankruptcy should have been determined, there is no occasion to consider the question (which may perhaps depend upon the statutes or the practice of the State) whether it will be within the authority of the court in which the suit is pending, now that the defendant has obtained his discharge in bankruptcy, to render a special judgment in favor of the plaintiffs for the purpose of charging the sureties on the bond given to dissolve the attachment; or any other question which may hereafter arise upon the production by the defendant of his certificate of discharge, or upon the suggestion of the assignee in bankruptcy.

Judgment reversed.

DUFF v. STERLING PUMP COMPANY.

1. Reissued letters-patent No. 6673, granted to Mrs. P. Duff, E. A. Kitzmiller, and R. P. Duff, Oct. 5, 1875, for an "improvement in wash-boards," on the surrender of original letters-patent No. 111,585, granted to Westly Todd, as inventor, Feb. 7, 1871, are not infringed by a wash-board constructed in accordance with the description contained in letters-patent No. 171,568, granted to Aaron J. Hull, Dec. 28, 1875.
2. In view of prior inventions, the claims of the letters-patent granted to Todd must be limited to the form which he shows and describes, namely, projections bounded by crossing horizontal and vertical grooves. They do not cover diamond-shaped projections bounded by crossing diagonal grooves.
3. In the field of wash-boards made of sheet metal, with the surface broken into protuberances formed of the body of the metal so as to make a rasping surface, and to strengthen the metal by its shape, and to provide channels for the water to run off, Todd was not a pioneer. He merely devised a new form to accomplish those results; and his letters-patent do not cover a form which is a substantial departure from it.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The case is stated in the opinion of the court.

Mr. L. L. Bond for the appellants.

There was no counsel for the appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a suit in equity brought for the alleged infringement of reissued letters-patent No. 6673, granted to Mrs. P. Duff, E. A. Kitzmiller, and R. P. Duff, Oct. 5, 1875, for an "improvement in wash-boards," on the surrender of original letters-patent No. 111,585, granted to Westly Todd, as inventor, Feb. 7, 1871. The specification of the reissue says: "The nature of my invention consists in the construction of a sheet-metal wash-board with a rubbing face longitudinally and transversely corrugated or ribbed, whereby such rubbing surface shall be made up of a series of projections, bounded by a series of horizontal, vertical, and angularly shaped grooves. The rubbing face somewhat resembles the face of a rasp or file in general appearance, though the projections are less sharp and angular." "In the accompanying drawing A represents the frame of the

wash-board, and is of ordinary construction. The rubbing surface is formed of sheet zinc or other suitable sheet metal, corrugated or provided with a series of raised portions, B, alternating, along the line of the corrugation or rib which forms them, with depressions or unraised portions, *a*, the corrugations and depressions extending in either direction across the sheet, so that a series of horizontal and vertical and also angularly shaped grooves are formed between the projections. Each projection, B, represents four inclined surfaces sloping from the apex of the projection into the grooves which surround and bound it. The grooves between the corrugations are also broken or interrupted at intervals by small projections or raised portions, C, each of which presents two lateral surfaces. In a wash-board thus longitudinally and transversely ribbed or corrugated, the inequalities of the rubbing surfaces are such that the desired effect is more readily and effectively attained, whereby the labor of washing is greatly diminished and is accomplished with ease and facility, and with less than the usual wear on the clothes." There are three claims in the patent, as follows: "1. A sheet-metal wash-board having a series of raised projections, B, each bounded by longitudinal and transverse grooves or depressions, substantially as set forth. 2. In a sheet-metal wash-board the projections, B, each bounded by grooves or depressions, in combination with raised projections, C, in the bottoms of the interlying grooves, substantially as set forth. 3. As a new article of manufacture, a sheet-metal wash-board, having a rubbing face both longitudinally and transversely ribbed or corrugated, substantially as set forth."

The wash-board of the defendant is made in accordance with the description contained in letters-patent No. 171,568, granted Dec. 28, 1875, to Aaron J. Hull. That description shows a sheet-metal wash-board provided with diamond-shaped projections, each bounded by diagonal grooves or depressions. The metal plate is described as being crimped to form oblong diamond-shaped projections, having the largest diameter running transversely across the board, each projection being bounded by a diagonal groove or depression, the upper corner of each diamond, where the grooves cross each other, being raised

higher than any other part of the same, and the corresponding lower corner being the lowest part of the diamond. The claim of the patent is this: "A wash-board of sheet metal, formed with a series of raised diamond-shaped projections, B, and a series of narrow diagonal grooves, *b*, between the projections, which cross each other, substantially as set forth."

The case was heard on pleadings and proofs in the Circuit Court. That court entered a decree declaring that the equities were with the defendant and dismissing the bill.

It is entirely clear that the specification of the Todd patent describes the grooves in the metal as being horizontal and vertical, and gives no other meaning to the words "transverse" and "longitudinal." It describes the transverse and longitudinal corrugating or ribbing as producing projections which are bounded by horizontal and vertical grooves. From the evidence, Todd took the old zinc wash-board corrugated into horizontal grooves, and corrugated or ribbed it again by vertical grooves crossing the horizontal grooves at right angles. Nothing is said in the specification as to the method of producing the corrugating or ribbing, nor does the patent claim any process or machinery.

In the Galusha and Safford patent of December, 1857, there is shown a wash-board formed of corrugated sheet metal. The specification states that the corrugations are formed of a series of elevations and depressions, the elevations and depressions being in parallel rows and in alternate positions with respect to each other; that the corrugations are oblong, their ends and sides inclined, and their edges somewhat rounded; that each elevation forms a figure approximating to a semi-cylinder pointed at each end, the ends of the elevations in one row overlapping the ends of those in the adjoining rows; that thus channels are formed for the escape of water downward; and that the form of the corrugations stiffens the board, as compared with the old form of parallel flutes extending entirely across the plate.

In the Crihfield patent of October, 1870, there is shown a zinc wash-board, composed of a series of irregularly placed diamond-shaped raised pieces, arranged in rows crosswise of the board from top to bottom, each alternate row being composed of more elevations than the adjacent [illegible], the elevations in one

row being opposite the spaces between the elevations in the two adjacent rows, and a series of oblique channels being thus formed up and down the board from either side. The specification states that the boards can be stamped out by die plates.

Nothing is shown in evidence to defeat the novelty of the claims of the Todd reissue, but, in view of the structures shown in the patents of Galusha and Safford and of Crihfield, the claims of the Todd reissue must be so limited as not to extend to a structure such as is described in the Hull patent. We do not perceive that in the wash-boards made by the defendant there is any substantial departure from the description in the Hull patent.

The case is one where, in view of the state of the art, the invention must be restricted to the form shown and described by the patentee. In the field of wash-boards made of sheet metal, with the surface broken into protuberances formed of the body of the metal, so as to make a rasping surface, and to strengthen the metal by its form, and to provide channels for the water to run off, Todd was not a pioneer. He merely devised a new form to accomplish these results. *Railway Company* v. *Sayles*, 97 U. S. 554. The defendant adopts another form. Under such circumstances the Todd patent cannot be extended so as to embrace the defendant's form. The latter is not a mere colorable departure from the form of Todd, but is a substantial departure. These views are in accordance with those heretofore announced by this court in *Merrill* v. *Yeomans*, 94 id. 568; *Keystone Bridge Co.* v. *Phœnix Iron Co.*, 95 id. 274; and *Burns* v. *Meyer*, 100 id. 671.

Decree affirmed.

GAGE v. HERRING.

1. Where, within four months before their expiration, letters-patent, covering a single claim for a combination of several elements, are reissued and extended, with the same description as before, but containing in addition to the original claim one for a combination of some of the elements only, the reissue is invalid as to the new claim.
2. Letters-patent for a combination of several elements are not infringed by using less than all the elements.
3. In letters-patent for an improvement in cooling and drying meal during its passage from the millstones to the bolts, the claim was for the arrangement and combination of a fan, producing a suction blast; the meal chest; a spout forming a communication between the fan and the meal chest; a dust room above, to catch the lighter part of the meal thrown upwards by the current of air; a rotating spirally-flanched shaft in the meal chest, conveying the meal to the elevator; a similar shaft in the dust room, conveying the meal dust to the elevator; and the elevator, taking the meal to the bolts. Within four months before the expiration of the letters, they were reissued and extended, with two claims, the one a repetition of the original claim, and the other for the combination of the fan, the communicating spout, the meal chest with the conveying shaft in it, and the elevator, but omitting the dust room with its conveying shaft. *Held*, that the reissue is valid for the old claim only; and is not infringed by the use of the fan, spout, meal chest with its conveying shaft, elevator, and dust room, without any conveying shaft in the dust room, or other mechanism performing the same function.

APPEAL from the Circuit Court of the United States for the Northern District of New York.

The case is stated in the opinion of the court.

Mr. George Harding for the appellants.

Mr. Edwin S. Jenney and *Mr. Benjamin F. Thurston* for the appellees.

MR. JUSTICE GRAY delivered the opinion of the court.

This is a bill in equity for the infringement of letters-patent for an improvement in means for cooling and drying meal, reissued to John Denchfield, and duly assigned to the plaintiffs. The original letters-patent to Denchfield were dated 20th April, 1858. The reissued letters-patent were dated 16th January, 1872, and extended for a period of seven years from 20th April, 1872. The Circuit Court held that the first claim of

the reissued patent was valid and had been infringed, and entered a decree for the plaintiffs. See 14 Blatchf. 293. The defendants appealed to this court.

The original patent begins by stating that Denchfield has invented "a new and improved arrangement of means for cooling and drying meal, during its passage from the grinding stones to the bolts." The reissued patent omits, in this connection, the words "during its passage from the grinding stones to the bolts." But both the original and the reissue, after referring to the same accompanying drawings, proceed as follows, the words in brackets being inserted in the reissue only:

"This invention consists in the peculiar arrangement of a suction fan, [conveyor or] conveyors, and elevators, as hereinafter described, whereby the meal, during its passage from the grinding stones to the bolts, is thoroughly dried and cooled within a limited space, the whole forming a simple and economical device."

Then follows a description, which is the same in the original patent and in the reissue, and is in substance as follows:

The millstones, A, and curbs, are arranged in the ordinary way on the bed, B. Spouts, C, carry the meal from the stones down into a chest, D, which is placed horizontally on the flooring of the mill. This chest is equal in length to the bed, so that all the spouts of the several stones may communicate with it; and it is divided horizontally lengthwise by a zigzag partition having openings in it. Within and at the bottom of this chest is placed a longitudinal shaft, F, having a spiral flanch on it. With one end of this shaft an elevator, F', communicates, which discharges its contents at *e*. A fan, G, is placed in a suitable box, H. This box communicates with a spout, I, the lower end of which communicates with the chest D, and the upper end with one end of a chest, J, in the uppermost part of the mill. Within that chest a series of vertical partitions, *i*, is so placed as to form a winding passage from its communication with the spout I to an opening at the opposite end of the chest. That chest also contains a longitudinal shaft, K, having a spiral flanch on it. Both shafts, F, K, are rotated by any proper means.

The rest of the specification, and the claim, both in the original patent and in the reissue, differing only by inserting in the reissue the parts printed below in brackets, are as follows: —

"The operation is as follows: The meal passes from the stones A down the spouts C and into the lower part of the chest D, and is conveyed by the spirally-flanched shaft F into the elevators F', the shaft F, which is a conveyor, moving the meal in the direction indicated by the arrows 3. The meal is carried up by the elevators and discharged at *e* directly into the bolts or into troughs, and may be conveyed by hopper-boys or any suitable conveying device into the bolts. While the meal is thus passed through the stones A, spouts C, and the chest D, a suction blast is produced by the fan G, said blast absorbing the moisture or vapor which the meal contains, and which is heated or warmed by the friction of the stones A. The meal, therefore, is dried and cooled, and, in consequence of the time consumed during its passage through the spouts C and chest D, will be perfectly acted upon by the blast, so that all free moisture will be absorbed. A portion of the finer and lighter particles of flour will follow the blast, and will be ejected up through the spout I and through the serpentine or winding passage formed by the parts *i*, and will settle in the outer end of the chest J, and be conveyed by the conveyor or flanched shaft K to a spout, *j*, through which it falls into the elevators F' and unites with the meal which is received by the elevators direct from the chest D. [This compound arrangement for operating on the meal while passing through the chest D, and on the escaped flour in the chest J, returning the latter to the elevators, while it is extremely well adapted for large flouring mills running at high speeds and with a strong suction blast, may not be either necessary or even practicable in all cases. When the grinding friction evolves only a moderate degree of heat, the chest J and its apparatus may be dispensed with, for, the blast being moderated to correspond, so small a quantity of the fine flour will be drawn through the spout I, that such flour may be ejected on the mill floor, and be disposed of in any convenient way so as to enter the bolts.]

"I do not claim forcing a current of air between a pair of millstones, while the same is in operation, for the purpose of keeping the stones in a cool state and preventing the heating of the grain; for such means, although not very efficient, have been previously used. But I am not aware that parts arranged as herein shown, so as to allow the meal to be subjected to the blast during its entire or nearly entire passage from the stones to the bolts, and insure the perfect drying and cooling of the meal, have been previously used.

"I claim, therefore, as new, and desire to secure by letters patent —

"[1. The arrangement and combination of the suction fan G and spout I with the meal chest D, receiving the meal from the grinding stones, and provided with a conveyor shaft F and elevator F', substantially as and for the purpose set forth.]

"[2.] The arrangement and combination of the chest[s] D J, shafts F K, elevators F', fan G, and spout I, substantially as and for the purpose herein shown and described."

No new device was invented by Denchfield, but his improvement consisted in a new combination of old means and devices. That combination, as described in the specification of his original patent, includes seven elements, namely: 1. The meal chest D at the bottom of the mill, into which the meal falls through the spouts C from the millstones. 2. The conveying shaft F, which takes the meal from this chest into the elevator F'. 3. The elevator F', which carries up the meal and discharges it into the bolts or hopper-boys. 4. The fan G, creating a suction blast, which cools and dries the meal during its passage through the millstones, the spouts C and the chest D. 5. The spout I, communicating with the fan, and through which the meal dust, following the blast of air, is thrown upwards into the chest J at the top of the mill. 6. The chest J, in which the meal dust settles. 7. The conveying shaft K, by which the meal dust is carried from this chest into the elevator.

The only devices, indeed, which take part in cooling and drying the meal, are the meal chest at the bottom of the mill with the rotating shaft in it, the spout by which that chest

communicates with the fan, and the fan itself. The other chest or dust room at the top of the mill collects and saves the lighter part of the meal thrown upwards by the fan. The rotating shafts in each chest convey all the meal, after it has been cooled, dried and collected, to the elevator, and the elevator takes it to the bolts.

But the fan, with its communicating spout and meal chest, the dust room, the two conveyors, and the elevator, tend to one result, the cooling and drying of the meal, without waste or loss, "on its passage from the grinding stones to the bolts," "the whole," as stated at the beginning of the specification, "forming a simple and economical device;" and the single claim in the original patent is for the arrangement and combination of the seven elements, designating them all with equal distinctness by appropriate letters.

The reissue was granted more than thirteen years and eight months after the date of the original patent, and less than four months before that patent would have expired; and contains two claims, the second of which is a repetition of the claim in the original patent.

The first claim in the reissue is for a combination of the "fan G and spout I with the meal chest D, receiving the meal from the grinding stones, and provided with a conveyor shaft F and elevator F';" and omits all mention of the dust room J and its conveyor shaft K. This claim then is for a combination of five of the seven elements of the combination for which the patent was originally granted. The effect is to enlarge the claim; for, while the original claim was only for these five elements in combination with the other two elements, and would not have been infringed by the use of a combination of the five without the other two, the new claim covers a combination of the five elements, whether used with or without the two others. *Prouty* v. *Ruggles*, 16 Pet. 336; *Vance* v. *Campbell*, 1 Black, 427; *Gould* v. *Rees*, 15 Wall. 187.

The statute in force at the time of the issue of the original patent authorized a surrender and reissue whenever any patent was "inoperative or invalid, by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification as his own invention more than he

had a right to claim as new." The statute in force at the time of the reissue made no change in this, except by striking out the words "description or." Act of July 4, 1836, c. 357, sect. 13; Rev. Stat., sect. 4916.

The plaintiffs do not contend that in the original specification the patentee claimed as his own invention more than he had a right to claim as new; or that there is any defect or insufficiency in any part of the description or specification, other than the final claim. The descriptive part is, word for word, the same in the original and in the reissue. It is argued that the claim in the original patent was too much restricted by including in the combination elements which were no part of the real invention, and that this mistake might properly be corrected in the reissue. But there being no error in the descriptive part of the specification, any mistake in the claim, which is the more important part, and upon which other inventors and the public have the right to rely, as defining the limits of the invention patented, would be apparent on the face of the patent and could not escape the notice of any person reading it with the least care and attention.

It is plausibly suggested that "the claim could be made perfect in form, and consistent with the description of all that portion of the apparatus which relates to the invention, by simply striking out the letter of designation for the upper chest, J, and the letter of designation for the conveyor shaft of that chest, K." But that the inventor did not and does not intend so to amend his claim is conclusively shown by his having repeated the same claim, including these very letters of designation, in the second claim of the reissued patent. His attempt is, while he retains and asserts the original claim in all particulars, to add to it another claim which he did not make, or suggest the possibility of, in the original patent, nor until that patent was about to expire.

To uphold such a claim, made so late, would be to disregard the principles governing reissued patents, stated upon great consideration by this court at the last term in the case of *Miller* v. *Brass Company*, 104 U. S. 350, and since affirmed in many other cases. *James* v. *Campbell*, id. 356; *Heald* v. *Rice*, id. 737; *Mathews* v. *Machine Company*, 105 id. 54; *Bantz* v.

Frantz, 105 U. S. 160; *Johnson* v. *Railroad Company*, id. 539; *Moffitt* v. *Rogers*, 106 id. 423.

The invalidity of the new claim in the reissue does not indeed impair the validity of the original claim which is repeated and separately stated in the reissued patent. Under the provisions of the patent act, whenever through inadvertence, accident or mistake, and without any wilful default or intent to defraud or mislead the public, a patentee in his specification has claimed more than that of which he was the original and first inventor or discoverer, his patent is valid for all that part which is truly and justly his own, provided the same is a material and substantial part of the thing patented, and definitely distinguishable from the parts claimed without right; and the patentee, upon seasonably recording in the Patent Office a disclaimer in writing of the parts which he did not invent, or to which he has no valid claim, may maintain a suit upon that part which he is entitled to hold, although in a suit brought before the disclaimer he cannot recover costs. Rev. Stat., sects. 4917, 4922; *O'Reilly* v. *Morse*, 15 How. 62, 120, 121; *Vance* v. *Campbell*, above cited. A reissued patent is within the letter and the spirit of these provisions.

The decree of the Circuit Court proceeds upon the ground that the first or new claim of the reissue has been infringed; but the plaintiffs' bill is not so restricted, and alleges generally that the defendants have infringed the reissued patent. If the defendants have infringed the second or old claim, the plaintiffs, upon filing a disclaimer of the new one, are entitled to a decree, without costs, for the infringement of the old and valid claim. Considering that the question of the validity of the new claim in the reissue is a question of law upon the face of the patent, and that its validity has been sanctioned by the Commissioner of Patents in granting the reissue, and upheld by the Circuit Court, there has been no unreasonable delay in entering a disclaimer; for the plaintiffs were not bound to disclaim until after a judgment of this court upon the question. *O'Reilly* v. *Morse*, above cited; *Seymour* v. *McCormick*, 19 How. 96.

The question then remains to be considered whether the evidence before us shows an infringement by the defendants of the entire combination.

It is proved, and not denied, that the apparatus in the defendants' mill is substantially like that described in the plaintiffs' patent, so far as regards the first meal chest, the fan, and the spout connecting with the fan, and also so far as regards the elevator, and the conveying shaft from the first meal chest to the elevator; in short, so far as regards the cooling and drying apparatus proper, and the devices for collecting and conveying the greater part of the meal, after being cooled and dried, to the bolts.

The defendants are also proved to have a dust room, by which the light meal dust thrown upwards by the fan through the spout is collected and saved. This part of their apparatus is not, indeed, in form exactly like that of the plaintiffs'. The plaintiffs' patent, with the accompanying drawings, describes a single dust room with vertical partitions attached alternately to the floor and to the ceiling, and extending part way of the height, against which partitions the meal dust, as it passes in a serpentine course over one partition and under the next, strikes, and falls to the floor; with an opening at the further end of the room to carry off the air after the meal dust has been deposited. The defendants' dust room consists of two or three successive chambers, communicating by spouts or conductors, against the walls or ceilings of which chambers the meal dust, as it is carried along by the current of air, strikes, and to the floors of which it falls; with a ventilator at the top of the uppermost chamber, through which the current of air passes out, after depositing the meal dust. The defendants' dust room of several chambers, with a ventilator at the top of the uppermost one, performs the same function in substantially the same way, and produces substantially the same result, as the plaintiffs' dust room with the partitions across it. In short, the defendants' dust room, or contrivance for collecting and saving the light meal dust thrown upwards by the fan, is a substantial equivalent for that of the plaintiffs. The defendants have therefore infringed this part also of the plaintiffs' combination. *Gould* v. *Rees*, above cited; *Ives* v. *Hamilton*, 92 U. S. 426; *Machine Company* v. *Murphy*, 97 id. 120.

The remaining part of the plaintiffs' combination is the conveyor shaft in the dust room, by which the fine meal dust, after

it has been collected and saved in that room, is transferred to the elevator and reunited with the rest of the meal. This conveyor performs indeed a subordinate function, analogous to that which the other conveying shaft and the elevator perform in regard to the principal part of the meal. But the patentee, in his specification and in his only valid claim, has made each of the conveyors, as well as the elevator, a material part of the combination invented and patented by him. He describes the conveyor shaft in the dust room with the same particularity as the other parts of his combination, and he claims it with equal distinctness.

As was said by Mr. Justice Bradley in *Water Meter Company* v. *Desper*, 101 U. S. 332, 337, "the courts of this country cannot always indulge the same latitude which is exercised by English judges in determining what parts of a machine are or are not material. Our law requires the patentee to specify particularly what he claims to be new, and if he claims a combination of certain elements or parts, we cannot declare that any one of these elements is immaterial. The patentee makes them all material by the restricted form of his claim. We can only decide whether any part omitted by an alleged infringer is supplied by some other device or instrumentality which is its equivalent."

The defendants' mill contains no conveyor shaft in the dust room, and no mechanism which performs the same function of removing the meal there collected. So far as the evidence shows, the meal deposited upon the floor of that room remains there until it is shovelled or swept up by manual labor. Its removal by such means affords no equivalent, in the sense of the patent law, for the automatic action described in the plaintiffs' patent. *Eames* v. *Godfrey*, 1 Wall. 78; *Murray* v. *Clayton*, Law Rep. 10 Ch. 675 note; *Clark* v. *Adie*, id. 667, 675, 676, and 2 App. Cas. 315.

The new claim in the reissue being invalid, and the defendants not having infringed the entire combination set forth in the repetition of the old claim, the decree below can neither be upheld upon the new claim, nor modified so as to apply it to the other claim, but must be reversed and the case remanded with directions to

Dismiss the bill.

SLAWSON v. GRAND STREET RAILROAD COMPANY.

1. It is the duty of the court to dismiss a suit brought to restrain the infringement of letters-patent, where the device or contrivance for which they were granted is not patentable, although such defence be not set up.
2. The invention described in reissued letters-patent No. 4240, granted to John B. Slawson, Jan. 24, 1871, is not patentable, as it is confined to putting in the ordinary fare-box used on a street car an additional pane of glass opposite to that next the driver, so that the passenger can see the interior of the box. The letters are therefore void.
3. Letters-patent No. 121,920, granted to Elijah C. Middleton, Dec. 12, 1871, are void. The fare-box, the head-light of the car, and the reflector are the elements of the contrivance described in the specification and claim for lighting the interior of the box at night, and they are old. What is covered by the letters is not patentable, as it is simply making in the top of the box an aperture through which the rays of the head-lamp are turned by means of a reflector.

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

This was a suit brought by John B. Slawson against the Grand Street, Prospect Park, and Flatbush Railroad Company, to restrain the infringement of two patents, one granted to him as inventor, and the other held and owned by him as an assignee.

The one first mentioned is a reissue, No. 4240, dated Jan. 24, 1871. The invention therein described is an improvement in fare-boxes for receiving the fares of passengers in omnibuses and street cars.

The specification describes the ordinary fare-box used in street cars and omnibuses, consisting of two apartments, the one directly above the other. This well-known contrivance, the specification declares, was so arranged that the passenger deposited his fare in an aperture in the top of the upper apartment. It fell upon and was arrested by a movable platform, which constituted at the same time the bottom of the upper apartment and the top of the lower. This platform turned on an axis acted on by a lever. When turned, the fare fell into the lower apartment, which was a receptacle for holding the fares accumulated during the trip. Upon withdrawing the lever, the platform resumed its horizontal position, ready to

arrest the next fare deposited. The upper apartment had a glass panel on the side next the driver, so that he could see the fare as it was deposited by the passenger. This contrivance enabled the passenger to pay his own fare, and furnished a place of safe deposit for it, so that it could not be abstracted by the driver. It enabled the driver to scrutinize the fare after it was deposited, and see that it was the proper ticket or the right amount in genuine coin before it was passed into the general receiving-box.

The improvement described in the patent consists in the insertion of a glass panel on that side of the upper apartment of the box next to the inside of the car or omnibus, and opposite to the glass panel next the driver, so that when the fare is temporarily arrested in the upper apartment the passenger can see and examine it before it passes into the lower or receiving apartment. The specification declares: "By this means disputes and contentions are prevented as to the sufficiency of the amount deposited to pay the fare, or as to the genuineness of the money or tickets used for that purpose. It also enables the passenger, when he has unintentionally deposited more than the amount of his fare, to call the attention of the driver to that fact, so that he, should the passenger require the difference to be paid back to him, may report the case to the proprietor or his agent on reaching the end of the route, who will then pay the difference to the passenger, who for this purpose must ride to the office at the end of the route."

The claim of the patent is thus stated: "A fare-box having two compartments, into one of which the fare is first deposited and temporarily arrested previously to its being deposited in the other, when the former is provided with openings, covered or protected by transparent media or devices, so arranged that the passengers can see through one and the driver or conductor through the other, in the manner substantially as and for the purposes set forth."

The other patent, No. 121,920, granted to Elijah C. Middleton, assignee of James F. Winchell, and by the former assigned to the complainant, bears date Dec. 12, 1871. It also is for an improvement in fare-boxes. The specification declares as follows: "This improvement relates to the mode of illuminating

the interior of a fare-box in street-railway cars or other vehicles when used during the night, and it consists in the construction of the fare-box with suitable openings and reflectors, arranged and adapted to receive light from the ordinary head-lamp placed above the fare-box, instead of requiring a separate lamp to illuminate it as heretofore."

The specification then describes the improvement substantially thus: The ordinary fare-box, consisting of two apartments, one above the other, is constructed with an orifice in the top of the upper apartment, said top forming the floor of the lamp-chamber. The orifice is closed with a sheet of glass, to prevent any access to the fare-box by that way. Immediately above the orifice there is placed in the roof of the lamp-chamber a reflector, in such an oblique position that it will cause the light which falls upon it to be thrown through the orifice into the upper apartment of the fare-box, in which the fare is temporarily deposited. The claim is stated as follows: "Lighting the interior of a fare-box at night by light obtained from the head-lamp of the car thrown by a reflector, I, through an opening, H, in the head-lamp box, into the chamber for the temporary detention of the fare for inspection, substantially in the manner and for the purpose set forth."

The answer denies that either of the improvements described in the patents was infringed, and that the persons therein named as the first inventors of said improvements are in fact the first inventors thereof, and avers that said improvements had been in public use and on sale in this country for more than two years before the applications for patents therefor were respectively made.

Upon final hearing the Circuit Court dismissed the bill on the ground that the patents are void because the improvements therein described do not embody invention within the meaning of the patent laws. From this decree the complainant appealed.

Mr. Livingston Gifford and *Mr. George Gifford* for the appellant.

Mr. David C. Van Cott and *Mr. Albert G. McDonald* for the appellee.

MR. JUSTICE WOODS, after stating the facts, delivered the opinion of the court.

The appellant insists that the dismissal of a bill because the inventions described in the patents were not patentable, when no such defence was set up in the answer, is of doubtful propriety, and is a practice unfair to complainants.

The practice was sanctioned by this court in *Dunbar* v. *Myers*, 94 U. S. 187. In that case the defence set up in the answer was want of utility in the patented invention; that the patentees were not the first inventors, &c. The Circuit Court rendered a decree for the complainant for a large sum, which this court reversed, with directions to the court below to dismiss the bill on the ground, not set up in the answer, that the improvement described in the patent sued on did not embody or require invention and was not patentable, and the patent was therefore void.

And in *Brown* v. *Piper*, 91 id. 37, 44, this court, speaking by Mr. Justice Swayne, said: "We think this patent was void on its face" (because the improvement described therein was not patentable), "and that the court might have stopped short at that instrument, and, without looking beyond it into the answers and testimony, *sua sponte*, if the objection were not taken by counsel, well have adjudged in favor of the defendant."

We think the practice thus sanctioned is not unfair or unjust to the complainant in a suit brought on letters-patent. If they are void because the device or contrivance described therein is not patentable, it is the duty of the court to dismiss the cause on that ground whether the defence be made or not. It would ill become a court of equity to render a money decree in his favor for the infringement of letters-patent which are void on their face for want of invention. Every suitor in such a cause should, therefore, understand that the question whether the invention, which is the subject-matter in controversy, is patentable or not is always open to the consideration of the court, whether the point is raised by the answer or not.

We have considered the alleged improvements described in the letters-patent set out in the complainant's bill, and agree with the Circuit Court in its conclusion that neither of them

involves invention, and that both the letters-patent are therefore void.

A glance at the specification and claim of the patent granted to the complainant Slawson shows that the invention described therein consists simply in the placing, in the ordinary fare-box used on street cars and omnibuses, of a glass panel opposite to the glass panel next the driver, usually inserted in such boxes. The patent does not cover the fare-box, it does not cover the insertion in the side of the fare-box next the driver of a glass panel, nor a combination of these two elements. It consists merely in putting an additional pane of glass in the fare-box opposite the side next the driver, so that the passengers can through it see the interior of the box. Such a contrivance does not embody or require invention. It requires no more invention than the placing of an additional pane of glass in a show-case for the display of goods, or the putting of an additional window in a room opposite one already there. It would occur to any mechanic engaged in constructing fare-boxes, that it might be advantageous to insert two glass panes, — one next the driver and the other next the interior of the car. But this would not be invention within the meaning of the patent law. *Hotchkiss* v. *Greenwood*, 11 How. 248; *Phillips* v. *Page*, 24 id. 164; *Dunbar* v. *Myers*, *ubi supra*. It is not a combination of the fare-box, having one glass panel with an additional glass panel, but is a mere duplication of the glass panel. Doubtless, a fare-box with two glass panels, arranged as described in the patent, is better than a fare-box with only one. But it is not every improvement that embodies a patentable invention. This rule was fairly illustrated in *Stimpson* v. *Woodman*, 10 Wall. 117, in which it was held that where a roller, in a particular combination, had been used before without particular designs on it, and a roller, with designs on it, had been used in another combination, it was not a patentable invention to place designs on the roller in the first combination, and that such a change, with the existing knowledge in the art, involved simply mechanical skill, which is not patentable.

In *Brown* v. *Piper*, *ubi supra*, it was said, that when the invention was simply the application by the patentees of an old

process to a new subject, without any exercise of the inventive faculty, and without the development of any idea which could be deemed new and original in the sense of the patent law, it was not patentable; and it was held that the application of a process for preserving meats and fruit, which had previously been used for preserving other perishable substances, was not patentable.

In *Atlantic Works* v. *Brady*, *ante*, pp. 192, 200, a case much in point, decided by this court at the present term, Mr. Justice Bradley said: "The design of the patent laws is to reward those who make some substantial discovery or invention which adds to our knowledge and makes a step in advance in the useful arts. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures." And it was held that the placing of a screw for dredging at the stem of a screw propeller, when the dredging had been previously accomplished by turning the propeller stern foremost and dredging with the propelling screw, was not a patentable invention.

These authorities, and others that might be cited, are adverse to the appellant's case, and clearly show that the contrivance covered by the patent issued to him does not embody a patentable invention.

The same authorities apply with equal force to the patent for lighting the interior of the fare-box at night by using the head-light of the car for that purpose. The elements of the contrivance, namely, the fare-box, the head-light, and the reflector, are all old. What is covered by the patent is simply the making of an aperture in the top of the fare-box and turning the rays of the head-lamp through it into the box by means of a reflector. In other words, it is the turning of the rays of light to the spot where they are wanted by means of a reflector, and taking away an obstruction to their passage. The facts of general knowledge of which we take judicial notice teach us that devices similar to this are as old as the use of reflectors. Taylor's Ev., sect. 4, note 2; *Brown* v. *Piper*, *ubi supra*. The new application of them does not involve invention. We are of opinion that there

was nothing patentable in the contrivance described in the second patent.

The result of our views is that the decree of the Circuit Court was right and must be

Affirmed.

UNITED STATES v. BRITTON.

1. The counts of an indictment against the president of a national banking association for making such a false entry on its books as is punishable under sect. 5209 of the Revised Statutes are sufficient if they are in the form hereinafter set forth, *post*, p. 656, as the offence is thereby alleged in apt terms, and with the requisite averments of time and place.
2. The counts which charge his fraudulent purchase of shares of the capital stock of the association are bad if they either fail to state for whose use the purchase was made, or if they state that it was made for the use of the association, or if they do not aver that it was not made in order to prevent loss on some previously contracted debt.
3. The counts which charge him with having wilfully misapplied the funds of the association should aver that he did so for the benefit of himself or some person or body other than the association, and with intent to injure or defraud the association or some other person or body corporate.
4. The counts which charge his fraudulent purchase of the shares of stock, and allege that they were by him held "in trust for the use of said association, and that said shares were not purchased as aforesaid in order to prevent loss upon any debts theretofore contracted with said association in good faith," do not allege with sufficient certainty an offence under said sect. 5209.
5. The purchase of stock in violation of sect. 5201, if made with intent to defraud, and by one or more of the officers of the bank named in said sect. 5209, is not a crime punishable under the latter section.

CERTIFICATE of division in opinion between the judges of the Circuit Court of the United States for the Eastern District of Missouri.

Section 5209 of the Revised Statutes of the United States is as follows: —

"Every president, director, cashier, teller, clerk, or agent of any" national banking "association who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or

who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association or any agent appointed to examine the affairs of any such association; and every person who, with like intent, aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

An indictment based on this section was, on Jan. 20, 1879, found against defendant, James H. Britton, in the District Court of the United States for the Eastern District of Missouri. It contained one hundred and nineteen counts. The first count charged as follows: —

"That James H. Britton, late of said district, on the thirtieth day of June, in the year of our Lord one thousand eight hundred and seventy-six, at said district, being then and there president of a certain national banking association then and there known and designated as the 'National Bank of the State of Missouri, in St. Louis,' which said association had been theretofore created and organized under and by virtue of an act of Congress, entitled 'An Act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,' approved June third, in the year of our Lord one thousand eight hundred and sixty-four, and which said association was then and there acting and carrying on a banking business in the city of St. Louis, in said district, under the said act of Congress and the acts amendatory thereof, did make in a certain book then and there belonging to and in use by the said association in transacting its said banking business, and then and there designated and known as 'profit and loss, number six,' a certain entry to the credit of a certain account known as profit and loss, which said entry was then and there in the words and figures following, that is to say: —

'RICHARD L. DICKSON:
'182 days' int., 8 per cent., 132,673.49, to July 1, '76 . . . 5,365.88'

and which said entry, so as aforesaid made in said book, then and there purported to show, and did, in substance and effect,

indicate and declare, that the sum of five thousand three hundred and sixty-five dollars and eighty-eight cents was then and there received by said association, on account of interest then and there due and payable to said association by one Richard L. Dickson.

"And the jurors aforesaid, on their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there false in this, that the said sum of five thousand three hundred and sixty-five dollars and eighty-eight cents was not then and there received by said association on account of interest then and there due and payable to said association from the said Richard L. Dickson, as he, the said James H. Britton, then and there well knew; and that the said entry, so made as aforesaid, was then and there false in this, that the said sum of five thousand three hundred and sixty-five dollars and eighty-eight cents was not then and there received by said association upon any account from any source, as he, the said James H. Britton, then and there well knew; and that the said false entry was then and there made as aforesaid with the intent then and there on the part of him, the said James H. Britton, to deceive any agent who might be thereafter appointed by the Comptroller of the Currency to examine the affairs of said association, contrary to the form of the statute of the United States in such case made and provided, and against their peace and dignity."

The thirty-four counts next following, numbered from 2 to 35, inclusive, charged, in the same language, the making of similar false entries in the same book with the same intent.

The thirty-sixth count was in all respects similar to the preceding thirty-five counts, except that it omitted the averment that the false entry was made with the intent "to deceive any agent who might be thereafter appointed by the Comptroller of the Currency to examine the affairs of said association," and in lieu thereof alleged it to be with intent "to injure and defraud the said association and certain persons to said jurors unknown."

The thirty-seventh count charged as follows: "That the said James H. Britton, late of said district, on the second day of April, in the year of our Lord one thousand eight hundred

and seventy-seven, at said district, being then and there president of a certain national banking association then and there known and designated as the 'National Bank of the State of Missouri, in St. Louis,' which said association had been theretofore created and organized under and by virtue of an act of Congress, entitled 'An Act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,' approved June third, in the year of our Lord one thousand eight hundred and sixty-four, and which said association was then and there acting and carrying on a banking business in the city of St. Louis, in said district, under the said act of Congress and the acts amendatory thereof, did pay to a certain person, to the jurors aforesaid unknown, a large sum of money, to wit, twenty-four hundred dollars, out of the moneys and funds then and there belonging to and the property of said association, in the purchase by him, the said James H. Britton, from said unknown person, of a large number, to wit, forty certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one Francis Fisher.

"And the jurors aforesaid, on their oaths aforesaid, do further present that the said James H. Britton, president as aforesaid, did then and there, by means of the payment aforesaid, in manner and form aforesaid, wilfully misapply the said sum of twenty-four hundred dollars of the moneys and funds as aforesaid of said association, with intent then and there, on the part of him, the said James H. Britton, to injure and defraud the said association and certain persons, to the jurors aforesaid unknown, contrary to the form of the statute of the United States in such case made and provided, and against their peace and dignity."

The next following nineteen counts, numbered from 38 to 56, inclusive, are similar to count 37, and need not be set out.

The next succeeding counts, numbered from 57 to 76, inclusive, but excepting the seventy-fourth, are similar to count 37, except that they omit the averment that the misapplication was made with intent "to injure and defraud the said

association and certain persons to the jurors aforesaid unknown." These counts aver no intent whatever. The seventy-fourth count is similar to the thirty-seventh.

The next twenty counts, numbered from 77 to 96, inclusive, are in all respects similar to count 37, except that they contain the following additional averment, forming the conclusion of the first clause of the count, namely, "and which said shares of stock, so purchased as aforesaid, were then and there held by him, the said James H. Britton, in trust for the use of said association, and which said shares of stock were not purchased as aforesaid in order to prevent loss upon any debt theretofore contracted with said association in good faith."

The next twenty counts, numbered from 97 to 116, are all similar to count 96, except that they omit the averment that the misapplication of the funds of the association was with the intent "to injure and defraud the said association and certain persons to the jurors aforesaid unknown." These counts charge no intent.

The count numbered 117 was similar to count 36, and count numbered 118 was similar to count 1.

As no division of opinion respecting count numbered 119 is certified, it is unnecessary to notice that count.

The defendant demurred to the indictment. By order of the District Court the indictment was, on May 16, 1879, remitted and transferred to the next regular term of the Circuit Court of the United States for the Eastern District of Missouri, at which term the cause was heard upon the demurrer. Upon such hearing the following questions arose, upon which the judges of the Circuit Court were divided and opposed in opinion, namely: —

1st, Whether it was necessary, in the counts of said indictment charging a fraudulent purchase by the defendant of certain shares of the capital stock of said association, to state for whose use the purchase was made, and whether, where it is charged in the indictment that the purchase of stock was made for the use of the bank, such averment vitiates the indictment.

2d, Whether it was necessary in the said counts to allege

that the purchase of stock was not made in order to prevent loss on some previously contracted debt.

3d, Whether it was necessary in the said counts to set forth the means by which the defendant, as president of said bank, possessed himself of the moneys of the bank, which he employed in purchasing said stock.

4th, Whether it was necessary to charge in the said counts that the defendant, as president of the bank, was in possession of the funds of the bank, in addition to charging misapplication of said funds.

5th, Whether the counts of said indictment charging the fraudulent purchase by the defendant, as president of said banking association, of certain shares of stock "in trust, for the use of said association, and which said shares of stock were not purchased as aforesaid in order to prevent loss upon any debts theretofore contracted with said association in good faith," alleged with sufficient certainty an offence under said sect. 5209 of the Revised Statutes of the United States.

6th, Whether count numbered 116 of the said indictment charges with sufficient certainty an offence under said sect. 5209 of the Revised Statutes of the United States.

7th, Whether it is necessary in an indictment under sect. 5209 of the Revised Statutes, charging wilful misapplication of the funds of a banking association, to allege that such misapplication was with intent to defraud.

8th, Whether the purchase of stock in violation of sect. 5201 of the Revised Statutes of the United States, if made with intent to defraud, and by one or more of the officers of the bank named in said sect. 5209 of the Revised Statutes, is a crime punishable under the latter section.

9th, Whether those counts which cover alleged false entries sufficiently state an offence under sect. 5209.

These questions, together with the pleadings upon which they arose, were, on motion of counsel for the United States, certified by the judges of the Circuit Court to this court for its opinion thereon.

Mr. Assistant Attorney-General Maury for the United States.

Mr. Chester H. Krum for the defendant.

MR. JUSTICE WOODS delivered the opinion of the court.

In passing upon the questions certified to us by the Circuit Court, it will be convenient to follow the order in which they have been argued by counsel, rather than that in which they are presented by the certificate.

The section of the Revised Statutes upon which the indictment is based creates and describes certain offences, and expressly denominates them misdemeanors. In *United States* v. *Mills*, 7 Pet. 138, 142, it was said by this court that "the general rule is that in indictments for misdemeanors created by statute, it is sufficient to charge the offence in the words of the statute. There is not that technical nicety required as to form which seems to have been adopted and sanctioned by long practice in cases of felony, and with respect to some crimes, where particular words must be used, and no other words, however synonymous they may seem, can be substituted. But in all cases the offence must be set forth with clearness, and all necessary certainty to apprise the accused of the crime with which he stands charged."

In *United States* v. *Simmons*, 96 U. S. 360, 362, this court, speaking by Mr. Justice Harlan, held, that "when the offence is plainly statutory, it is, 'as a general rule, sufficient in the indictment to charge the defendant with acts coming within the statutory description in the substantial words of the statute, without any further expansion of the matter.' . . . But to this rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised in the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defence and plead the judgment as a bar to any subsequent prosecution for the same offence."

So in *United States* v. *Carll*, 105 id. 611, 612, it was said by Mr. Justice Gray, speaking for the court, that "in an indictment upon a statute it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; and the fact that the statute in question, read in the light of the common law and of other

statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

In *United States* v. *Pond*, 2 Curt. C. C. 265, the rule was thus stated by Mr. Justice Curtis: "It must be remembered that this is an indictment for a misdemeanor created by the statute, and that in general it is sufficient to describe such an offence in the words of the statute, unless they embrace cases which it was not the intention of the legislature to include within the law. If they do, the indictment should show that this is not one of the cases thus excluded."

Applying the rules thus laid down to the counts of the indictment, we are to consider whether they sufficiently state an offence under sect. 5209 of the Revised Statutes.

To describe the offence charged in the first thirty-six counts of the indictment, sect. 5209 requires the following averments:

1. That the accused was the president or other officer of a national banking association, which was carrying on a banking business.

2. That being such president or other officer, he made in a book, report, or statement of the association, describing it, a false entry, describing it.

3. That such false entry was made with intent to injure or defraud the association, or to deceive any agent, describing him, appointed to examine the affairs of the association.

4. Averments of time and place.

An examination of the counts under consideration shows that they contain all these averments pleaded with clearness and reasonable certainty. They must, therefore, be held sufficient, unless some of the objections made to them by counsel for defendant are well taken.

It is urged that these counts are defective, because they do not contain an averment that the false entry was made "in an account of and in the due course of business of the bank." Neither of these averments is required by the statute. It is alleged that the false entry was made in a book belonging to and in use by the association in transacting its banking business, and known and designated as "profit and loss, num-

ber six." To hold this insufficient would carry refinement in criminal pleading to an impracticable extent. The counts point out to the defendant and the court, with certainty and precision, the book used by the association in which the false entry was made, and this is all that is necessary under the statute.

It is next objected that the false entries as set out in the counts do not of themselves have any significance, and are unintelligible without explanation. This is mere assumption. Conceding that the entries may be unintelligible to persons not skilled as accountants, it does not follow that they are so to the agent appointed by the Comptroller, who, it is alleged, was the person whom the entries were intended to deceive. But, if the entries needed explanation, it was perfectly competent for the pleader to explain them by innuendo. *Rex* v. *Griepe*, 1 Ld. Raym. 256; *Rex* v. *Aylett*, 1 T. R. 63; *Rex* v. *Taylor*, 1 Camp. 404; *Reg.* v. *Virrier*, 12 Ad. & E. 317; *Mix* v. *Woodward*, 12 Conn. 262; *Van Vechten* v. *Hopkins*, 5 Johns. (N. Y.) 211. This he has done by averring what the entries purported to show, and did, in substance, indicate and declare. Having explained the entries, he avers them to be false. To hold this insufficient would be to decide that the making of false entries, in the books of a banking association, in the usual method of book-keeping, and which were intelligible to all accountants, could not be punished under the statute because not intelligible to persons generally, or to persons not skilled in book-keeping.

It is next objected that the counts under consideration are argumentative and repugnant, because they do not allege that interest was due to the association from the individuals named in the alleged false entries.

This objection is not well founded. Whether interest was due or not is quite immaterial. The charge is that a false entry was made on the books of the association which purported that a certain sum was, on a day named, received from a person named, on account of interest then and there due from him to the association; that the said sum was not then and there received on account of interest due, and was not received on any account from any sources whatever. The falsity of the entry

does not consist in the fact that there was no interest due from the person named, but in the fact that money, which the entries declared had been received from him on account of interest due, had not been received from him on that or any other account. It was, therefore, entirely unnecessary to aver that no such interest was due, and the want of such averment does not render the counts argumentative or repugnant.

It is further objected to these counts that a false entry to the credit of profit and loss alone could not deceive a bank examiner, and, therefore, that the counts are repugnant. This is also mere assumption. But if the false entry is calculated to deceive, the making of it in the books of the association, with intent to deceive, is all that is necessary to bring the act within the meaning of the statute. It is perfectly apparent that any false entry in any account-book of a bank used in transacting its banking business is calculated to deceive. The fact that its falsity may be exposed by an examination of other books of account, does not render it any the less a false entry made with intent to deceive. The circumstance that the attempt to deceive by making a false entry was not an adroit and skilful one, does not relieve the act of its criminal character.

It is further contended that the counts under consideration are insufficient, because it is not alleged that at the time the false entries were made an agent had been appointed to examine the affairs of the association. This objection is based on the theory that the statute was designed to punish only those officers of a banking association who made false entries in its books with intent to deceive examiners appointed before the false entries were made. We do not think the statute will bear this construction.

The appointment of agents to examine the affairs of national banking associations is provided for by sect. 5240 of the Revised Statutes, which declares: "The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall as often as shall be deemed necessary or proper, appoint a suitable person or persons to make an examination of the affairs of every banking association, who shall have power to make a thorough examination into all the affairs of the association."

It appears from this section that the appointment of these agents is not permanent, but occasional and temporary, and that the appointments are made as often as shall be deemed necessary and proper. It is, therefore, apparent that the statute which punishes false entries, made with intent to deceive such agents, refers to any entries made with that intent whether before or after the appointment of the agent.

There is nothing impossible in the averment that false entries have been made with intent to deceive an agent to be appointed after they are made. The agents are often purposely appointed without notice to the association. The fact that the Comptroller of the Currency has information that the officers of an association are making false entries in its books may be the occasion for appointing an agent to examine its affairs. To hold that the officers of the association would only be punishable for false entries made after an agent had been appointed would rob the law of a large part of its salutary effect. Its purpose is clear, to punish all false entries in the books of the bank, no matter when made, if made with intent to defraud the association or deceive the examiner. We think that in respect to the point under consideration the indictment is sufficient.

We are of opinion that none of the objections raised to the first thirty-five counts are well taken. They are refined and unsubstantial, and not sustained by the rules of criminal pleading in cases of misdemeanor, or by the fair construction of the statute on which the indictment is based. These counts embody the language of the statute; they charge every element of the offence created by the statute with sufficient certainty, and give the defendant clear notice of the charge he is called on to defend. They are, therefore, sufficient. *United States* v. *Cook*, 17 Wall. 168, and cases already cited.

The thirty-sixth count differs from the first thirty-five in charging the intent with which the offence was committed. The intent is charged to be "to injure and defraud the said association, and certain persons to the grand jurors unknown." This follows the language of the statute.

Clearly it is possible to injure and defraud the association or its stockholders or other persons, by false entries in its account

of profit and loss. The charge is not repugnant or impossible. We are of opinion, therefore, that the first thirty-six counts of the indictment, being those which charge false entries in the books of the association, sufficiently state an offence under sect. 5209. It follows that count 117, which is in all respects similar to count 1, and count 118, which is in all respects similar to count 36, are good and sufficient.

We shall next consider count numbered 77 and the similar counts. That portion of the section on which they are based makes it an offence for the president or other officer of a banking association to embezzle, abstract, or wilfully misapply the moneys of the association with intent to injure or defraud the association or any company or person.

The seventy-seventh count of the indictment charged that the defendant, being president of the association, paid to a certain person unknown the sum of $2,400 of the moneys of the association in the purchase of forty shares of its capital stock, which stock, so purchased, was held by the defendant in trust for the use of the association, and the same was not purchased to prevent loss on any debt theretofore contracted with the association in good faith, and that so the defendant did wilfully misapply the moneys of the association with intent to injure and defraud the association and certains persons to the grand jurors unknown.

The question is propounded to us, whether this count sufficiently describes an offence under sect. 5209 of the Revised Statutes.

The purchase of its own stock by the association, except to secure a debt due it, is forbidden by law. Is a purchase for the use of a banking association of its own stock by its president, when not necessary to secure a debt due the association, a wilful misapplication of its funds, punishable by sect. 5209?

We think the wilful misapplication made an offence by this statute means a misapplication for the use, benefit, or gain of the party charged, or of some company or person other than the association. Therefore, to constitute the offence of wilful misapplication, there must be a conversion to his own use or the use of some one else of the moneys and funds of the asso-

ciation by the party charged. This essential element of the offence is not averred in the counts under consideration, but is negatived by the averment that the shares purchased by the defendant were held by him in trust for the use of the association, and there is no averment of a conversion by the defendant to his own use or the use of any other person of the funds used in the purchase of the shares. The counts, therefore, charge maladministration of the affairs of the bank, rather than criminal misapplication of its funds.

If we hold these counts to be good, then every official act of any officer, clerk, or agent of a banking association, by which its funds are applied in a way not authorized by law, would be punishable under sect. 5209.

For instance, sect. 5200 of the Revised Statutes declares that "the total liabilities to any association of any person, . . . for money borrowed, . . . shall at no time exceed one-tenth part of the capital stock of the association actually paid in." Sect. 5201 provides that no association shall make any loan or discount on the security of the shares of its own capital stock, unless such security shall be necessary to prevent loss on a previously contracted debt. If the counts under consideration are sustained, then every president, director, cashier, teller, clerk, or agent of a banking association who has any part in lending the money of the association contrary to the provisions of these sections, is guilty of a criminal misapplication of its funds.

So, by sect. 5137 of the Revised Statutes, the purposes for which a banking association may purchase and hold real estate are limited and specifically pointed out. If the directors of a banking association should authorize the purchase of a piece of real estate for its use, but not for purposes authorized by the statute (even though with intent to injure some corporate body or natural person), it could hardly be claimed that the directors who made the order, and the other officers or agents of the association who (with a like intent) had any hand in making the purchase or in paying out the money of the bank therefor, would be liable to indictment and imprisonment under sect. 5209.

The acts charged by the counts under consideration are precisely of the same character as those just mentioned. They

are acts of maladministration of the affairs of the association by its officers. The penalty for such acts is prescribed by sect. 5239, which declares: "If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title (national banks), all the rights, privileges, and franchises of the association shall be thereby forfeited. . . . And in case of such violation, every director who participated in or assented to the same shall be held liable, in his personal and individual capacity, for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation."

We are, therefore, of opinion that the wilful misapplication of the moneys and funds of the banking association, which is made an offence by sect. 5209, means something different from the acts of official maladministration referred to in sect. 5239, and it must be a wilful misapplication for the use or benefit of the party charged, or of some person or company other than the association, with intent to injure and defraud the association or some other body corporate or some natural person.

As the counts under consideration, namely, count 77, and the similar counts down to and including count 96, do not show that the wilful misapplication therein alleged was made by the defendant for his own use, benefit, or advantage, but for the use of the association, we are of opinion that they do not allege an offence under sect. 5209, and are, therefore, insufficient and bad.

The counts are, in our opinion, bad also for repugnancy. They aver that the defendant purchased the shares of the association, and held them in trust for the association. This charge, without further averments, is clearly repugnant. It is true that it is possible for an officer of a banking association, with intent to defraud it, to misappropriate its funds in the purchase for its use of its own stock. But the count which avers such an act should also make other averments to show that the application was not merely a use of the money for the benefit of the association forbidden by law, but a criminal misapplication, by which it was possible that the association could be defrauded.

For the reasons assigned, the counts next following, numbered from 97 to 116, inclusive, which are similar to count 77, except that they severally fail to aver that the act therein charged was done with intent to injure and defraud, must be held to be insufficient.

The counts last mentioned, as well as the counts numbered from 56 to 76, inclusive, are bad for the further reason that they fail to aver any intent to injure and defraud mentioned in sect. 5209. The intent to injure and defraud is an essential ingredient to every offence specified in the section, and the failure to aver the intent is a fatal defect in the counts in which it occurs.

We shall next consider count numbered 37 and the counts which are similar to it. These counts simply charge that the defendant, being president of the association, wilfully misapplied its moneys and funds by buying therewith certain shares of its stock, with intent to injure and defraud the association and certain persons to the grand jurors unknown.

The words "wilfully misapplied" are, so far as we know, new in statutes creating offences, and they are not used in describing any offence at common law. They have no settled technical meaning like the word "embezzle" as used in the statutes, or the words "steal, take and carry away," as used at common law. They do not, therefore, of themselves fully and clearly set forth every element of the offence charged. It would not be sufficient simply to aver that the defendant "wilfully misapplied" the funds of the association. This is well settled by the authorities we have already cited. There must be averments to show how the application was made and that it was an unlawful one. These averments the pleader has in these counts attempted to make by charging that the defendant paid out the funds of the association in the purchase of its own stock. But this is not necessarily an unlawful use of the funds of the association. It is not every purchase of its own shares by an association that is forbidden. The very section (5201) and sentence of the statute which declares that no banking association shall be a purchaser of its own shares, contains the exception "unless such purchase shall be necessary

to prevent loss upon a debt previously contracted in good faith." This exception should have been negatived in these counts. The rule of pleading as laid down by Mr. Chitty is that "when a statute contains provisos and exceptions in distinct clauses it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the provisos it contains. On the contrary, if the exceptions themselves are stated in the enacting clause it will be necessary to negative them in order that the description of the crime may in all respects correspond with the statute." 1 Chitty, Crim. Law, 288 *b*, 284.

Thus, where a statute declared that if one on the Sabbath day "shall exercise any secular labor, business, or employment, except such only as works of necessity and charity, he shall be punished," &c., a negative of the exception was held indispensable. *State* v. *Barker*, 18 Vt. 195. See also *Commonwealth* v. *Maxwell*, 2 Pick. (Mass.) 139; 1 East, P. C. 167; *Spieres* v. *Parker*, 1 T. R. 141; *Gill* v. *Scrivens*, 7 id. 27; 1 Bishop's Crim. Pro., sect. 636.

The failure of the counts under consideration to aver that the purchase of the shares of the association was not necessary to prevent loss upon a debt previously contracted in good faith is a fatal defect. These counts merely charge that the defendant wilfully misapplied the funds of the association and then aver a use of the funds, which, from all that appears to the contrary, was a perfectly lawful application of them. The result is that no offence is described in the counts numbered from 37 to 56, inclusive, and that they are, therefore, insufficient and bad. It also follows that counts numbered from 57 to 76, inclusive, which are similar to the series just mentioned, except that they contain no charge of intent to injure and defraud, are also bad.

What we have said disposes of all the questions propounded to us which it is necessary that we should answer.

We answer the first, second, seventh, and ninth questions in the affirmative, and the fifth, sixth, and eighth questions in the negative.

From these answers it appears that all the counts from the thirty-seventh to the one hundred and eighteenth, inclusive, are

insufficient and bad. We therefore decline to answer the third and fourth questions, which relate to the same counts. *United States* v. *Buzzo*, 18 Wall. 125.

UNITED STATES v. CURTIS.

An indictment for perjury against an officer of a national bank, for a wilfully false declaration or statement in a report made under sect. 5211 of the Revised Statutes is bad, if, prior to the passage of the act of Feb. 26, 1881, c. 82, his oath verifying the report was taken before a notary public appointed by a State, as such a notary had at that time no authority under a law of the United States to administer the oath.

CERTIFICATE of division in opinion between the judges of the Circuit Court of the United States for the Eastern District of Missouri.

The case is stated in the opinion of the court.

Mr. Assistant Attorney-General Maury for the United States.

Mr. Chester H. Krum, *contra*.

MR. JUSTICE HARLAN delivered the opinion of the court.

This case comes before us on a certificate of division as to certain questions of law arising in a criminal prosecution against Edward P. Curtis, based upon sects. 5211 and 5392 of the Revised Statutes of the United States.

The first of those sections provides that every national banking association "shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three of the directors. Each such report shall exhibit in detail, and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him specified; and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him, and in the same form in which it is made to the

Comptroller shall be published in a newspaper where such association is established," &c.

Sect. 5392 provides that "Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed."

The wilfully false declarations or statements which the defendant is charged to have made are contained in several written reports transmitted to the Comptroller of the Currency by the National Bank of the State of Missouri, in St. Louis, in pursuance of sect. 5211, and to the truth of which declarations or statements Curtis, as cashier of that bank, made oath before a notary public within and for the county of St. Louis in that State. These declarations or statements relate to the condition of the bank as to loans, discounts, checks, cash items, overdrafts, individual deposits subject to checks, surplus fund, currency on deposit, and money due from that association to other national banks. The indictment contains five counts, which, as respects any matter now to be determined, do not substantially differ, except as to the several dates when the alleged oaths were taken. Those dates were July 18 and Oct. 10, 1876, and Jan. 15, Jan. 26, and April 5, 1877.

The controlling question is as to the authority of the notary to administer the oaths, upon the falsity of which the indictment is laid.

It is fundamental in the law of criminal procedure that an oath before one who has no legal authority to administer oaths of a public nature, or before one who, although authorized to administer some kind of oaths, but not the one which is brought in question, cannot amount to perjury at common law, or sub-

ject the party taking it to prosecution for the statutory offence of wilfully false swearing. 1 Hawk. P. C., b. 1, c. 27, sect. 4, p. 430, 8th ed. by Curwood; Roscoe's Cr. Evid. (7th Am. ed.), p. 817; 2 Whart. Crim. Law, sect. 2211; 2 Arch. Crim. Pr. & Pl. (8th ed.), p. 1722. If, therefore, Curtis, at the time the several oaths alleged to be false were taken, was not authorized by the laws of the United States to take them before a notary public, he cannot be proceeded against under sect. 5392. The statute, in conformity with an established rule of criminal law, expressly declares that the oath must be taken before some "competent tribunal, officer, or person." This does not necessarily mean that the tribunal by which the oath is administered shall have been created by the government which required it to be taken, nor that the officer who administers it shall be an officer of that government. But the statute does mean that the oath must be permitted or required, by at least the laws of the United States, and be administered by some tribunal, officer, or person authorized by such laws to administer oaths in respect of the particular matters to which it relates. So that the underlying question is whether the notary public, whose commission is from the State, was, at the respective dates of the oaths taken by Curtis, authorized by the laws of the United States to administer such oaths.

This question we are constrained to answer in the negative. We are not aware of any act of Congress which gave such authority to notaries public in the different States at the several dates given in the indictment. The Assistant Attorney-General insists that such authority may be found in sect. 1778 of the Revised Statutes, which declares: "In all cases in which, under the laws of the United States, oaths or acknowledgments may now be taken or made before any justice of the peace of any State or Territory, or in the District of Columbia, they may hereafter be also taken or made by or before any notary public duly appointed in any State, district, or Territory, or any of the commissioners of the Circuit Courts, and, when certified under the hand and official seal of such notary or commissioner, shall have the same force and effect as if taken or made by or before such justice of the peace."

The authority of the notary to administer these oaths to

Curtis cannot be derived from that section, unless, at the dates in question, they could, under the laws of the United States, have been taken before justices of the peace in Missouri. But the latter officers had no such authority by any Federal statute to which our attention has been called, or which we are able to find. Sect. 1778, so far as notaries public are concerned, embodies the substance of similar provisions in the acts of Sept. 16, 1850, c. 52, and July 29, 1854, c. 159, and sect. 20 of the act of June 22, 1874, c. 390. But nothing in these acts, even if they remained in force after the adoption of the Revised Statutes, supports the authority exercised by the notary public who administered these oaths to defendant.

Counsel for the United States further insists that a proper construction of sect. 1778 will authorize a notary public in *any* State to administer oaths to officers of national banking associations, when making reports to the Comptroller of the Currency, if justices of the peace may lawfully do so in this District. But in our judgment no such interpretation of that provision is admissible. What Congress intended by that section was to give notaries public in their respective States the same authority, in the administration of oaths, as is given, under the laws of the United States, to justices of the peace in the same States; and to notaries public in this District the same authority, in administering oaths, which, under the laws of the United States, might be exercised by justices of the peace in this District. We have seen, however, that to justices of the peace, in the several States, such authority had not been given by any provision in the Revised Statutes, or by any act of Congress prior to their adoption.

Nor can any support for the indictment be derived from the act of Aug. 15, 1876, c. 304, which declares "that notaries public of the several States, Territories, and the District of Columbia, be, and they are hereby, authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits, in the same manner and with the same effect as commissioners of the United States Circuit Court may now lawfully take or do."

The power of commissioners of the Circuit Court did not,

at the passage of that act, extend to the taking of oaths to reports by officers of national banks. They could take affidavits when required, or allowed in any civil cause in a Circuit or District Court, Rev. Stat., sect. 945; Act of Feb. 20, 1812, c. 25, Act of March 1, 1817, c. 30; or administer oaths where, in the same State, under the laws of the United States, oaths, in like cases, could be administered by justices of the peace, Rev. Stat., sect. 1778; or they could take evidence, affidavits, and proof of debts in proceedings in bankruptcy, Rev. Stat., sects. 5003, 5076; Act of March 2, 1867, c. 176; sect. 3 of the Act of July 27, 1868, c. 258; sect. 20 of the Act of June 22, 1874, c. 390. But the authority of commissioners did not extend to such oaths as were administered to Curtis.

Our attention is called by counsel for the government to *United States* v. *Bailey*, 9 Pet. 238. That case, it is claimed, furnishes ample ground for an implication that the notary public who administered the oath in this case was fully empowered to do so. We do not so interpret that decision. That was an indictment for false swearing. It was based upon an act of Congress which provided that if any person shall swear or affirm falsely touching the expenditure of public money, or in support of any claim against the United States, he should, upon conviction, suffer as for wilful, corrupt perjury. The alleged false oath was administered before a justice of the peace for the Commonwealth of Kentucky. It was admitted that there was no statute of the United States expressly empowering a justice of the peace to administer the oath taken by Bailey. But the authority of that officer was sustained upon the ground that the Secretary of the Treasury had previously, and as incident to his duty and authority under an act of Congress, established a regulation permitting affidavits in support of claims against the United States to be made before justices of the peace. Except for that regulation the court, it is manifest, would not have sustained the indictment.

The conclusion, therefore, is not to be avoided, and it will accordingly be certified to the court below, that the alleged false oaths of the defendant were not taken before an officer competent, at the time, under the laws of the United States,

to administer them. The absence of such authority in notaries public seems to have been recognized by Congress when it passed the act of Feb. 26, 1881, c. 82, declaring "that the oath or affirmation required by sect. 5211 of the Revised Statutes, verifying the returns made by national banks to the Comptroller of the Currency, when taken before a notary public properly authorized and commissioned by the State in which such notary resides and the bank is located, or any other officer having an official seal, authorized in such State to administer oaths, shall be a sufficient verification, as contemplated by said section 5211: *Provided*, that the officer administering the oath is not an officer of the bank."

What has been said renders it unnecessary to consider any other question of law certified by the judges of the Circuit Court.

NATIONAL BANK OF XENIA v. STEWART.

At the time of borrowing money from a national bank, A. delivered to it, as collateral security for the debt thereby created, the certificate of his shares of its capital stock. On his failure to pay at the stipulated time, the bank sold the stock at its full market value, and applied the entire proceeds to his credit. On the ground that sect. 5201 of the Revised Statutes prohibited a loan by the bank "on the security of the shares of its own capital stock," A. brought an action for the proceeds. *Held*, that he is not entitled to recover.

ERROR to the Circuit Court of the United States for the Southern District of Ohio.

The administrators of the estate of Daniel McMillan, deceased, brought an action against the First National Bank of Xenia, Ohio, a corporation formed under the National Bank Act of the United States, to recover the sum of $4,200, with interest. The complaint alleges that in October, 1876, the bank was in possession of thirty shares of its capital stock belonging to the deceased; that it then unlawfully converted them to its own use and sold them, receiving therefor the sum mentioned, which it refuses to account for or deliver to the plaintiffs, although a demand for it has been made.

The bank, in its answer, avers that in April, 1876, McMillan was owing to it a debt previously contracted, greater in amount than the value of the shares of capital stock; that it being necessary to secure the bank from loss, he delivered to it certificates of the shares with other property, as collateral security for the debt; that in October, 1876, the debt being unsatisfied and overdue, the bank sold the shares at their full market value and applied the proceeds as a credit upon it; and that after such application a large amount remained due to the bank which is still unpaid. The evidence produced at the trial tended to show that the shares were delivered by McMillan to the bank as collateral security for money loaned to him *at the time*, and were thus held until they were sold. The court charged the jury that if they found from the evidence that the stock was delivered by him to the bank as a pledge or collateral security for a present loan of money *made to him by the bank at the time of such delivery*, the plaintiffs were entitled to recover the amount of the proceeds, with interest from the time of sale; as the defendant was prohibited by the currency act from thus receiving its own stock. To this charge the defendant excepted. The plaintiffs recovered a verdict, and to review the judgment entered thereon this writ of error was brought.

The case was argued by *Mr. John Little* for the plaintiff in error, and by *Mr. Edgar M. Johnson* for the defendants in error.

MR. JUSTICE FIELD delivered the opinion of the court.

Section 5201 of the Revised Statutes declares that "no association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association."

While this section in terms prohibits a banking association from making a loan upon the security of shares of its own stock, it imposes no penalty, either upon the bank or borrower, if a

loan upon such security be made. If, therefore, the prohibition can be urged against the validity of the transaction by any one except the government, it can only be done before the contract is executed, while the security is still subsisting in the hands of the bank. It can then, if at all, be invoked to restrain or defeat the enforcement of the security. When the contract has been executed, the security sold, and the proceeds applied to the payment of the debt, the courts will not interfere with the matter. Both bank and borrower are in such case equally the subjects of legal censure, and they will be left by the courts where they have placed themselves.

There is another view of this case. The deceased authorized the bank, in a certain contingency, to sell his shares. Supposing it was unlawful for the bank to take those shares as security for a loan, it was not unlawful to authorize the bank to sell them when the contingency occurred. The shares being sold pursuant to the authority, the proceeds would be in the bank as his property. The administrators, indeed, affirm the validity of that sale by suing for the proceeds. As against the deceased, however, the money loaned was an offset to the proceeds. In either view the administrators cannot recover.

The judgment of the court, therefore, must be reversed and the cause remanded for a new trial; and it is

So ordered.

ESCANABA COMPANY *v.* CHICAGO.

1. The Chicago River and its branches, although lying within the limits of the State of Illinois, are navigable waters of the United States over which Congress, in the exercise of its power under the commerce clause of the Constitution, may exercise control to the extent necessary to protect, preserve, and improve their free navigation; but until that body acts, the State has plenary authority over bridges across them, and may vest in Chicago jurisdiction over the construction, repair, and use of those bridges within the city.
2. There is nothing in the ordinance of July 13, 1787, or in the subsequent legislation of Congress, that precludes the State from exercising that authority.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The case is fully stated in the opinion of the court.

Mr. Alexander T. Britton, *Mr. Jehiel H. McGowan*, and *Mr. Homer Cook* for the appellant.

Mr. Frederick S. Winston, Jr., for the appellee.

MR. JUSTICE FIELD delivered the opinion of the court.

The Escanaba and Lake Michigan Transportation Company, a corporation created under the laws of Michigan, is the owner of three steam-vessels engaged in the carrying trade between ports and places in different states on Lake Michigan and the navigable waters connecting with it. The vessels are enrolled and licensed for the coasting trade, and are principally employed in carrying iron ore from the port of Escanaba, in Michigan, to the docks of the Union Iron and Steel Company on the south fork of the south branch of the Chicago River in the city of Chicago. In their course up the river and its south branch and fork to the docks they are required to pass through draws of several bridges constructed over the stream by the city of Chicago; and it is of obstructions caused by the closing of the draws, under an ordinance of the city, for a designated hour of the morning and evening during week-days, and by a limitation of the time to ten minutes, during which a draw may be left open for the passage of a vessel, and by some of the piers in the south branch and fork, and the bridges resting on them, that the corporation complains; and to enjoin the city from closing the draws for the morning and evening hours designated, and enforcing the ten minutes' limitation, and to compel the removal of the objectionable piers and bridges, the present bill is filed.

The river and its branches are entirely within the State of Illinois, and all of it, and nearly all of both branches that is navigable, are within the limits of the city of Chicago. The river, from the junction of its two branches to the lake, is about three-fourths of a mile in length. The branches flow in opposite directions and meet at its head, nearly at right angles with it. Originally the width of the river and its branches seldom exceeded one hundred and fifty feet; of the branches and fork it was often less than one hundred feet; but it has been greatly enlarged by the city for the convenience of its commerce.

The city fronts on Lake Michigan, and the mouth of the Chicago River is near its centre. The river and its branches divide the city into three sections; one lying north of the main river and east of its north branch, which may be called its northern division; one lying between the north and south branches, which may be called its western division; and one lying south of the main river and east of the south branch, which may be called its southern division. Along the river and its branches the city has grown up into magnificent proportions, having a population of six hundred thousand souls. Running back from them on both sides are avenues and streets lined with blocks of edifices, public and private, with stores and warehouses, and the immense variety of buildings suited for the residence and the business of this vast population. These avenues and streets are connected by a great number of bridges, over which there is a constant passage of foot-passengers and of vehicles of all kinds. A slight impediment to the movement causes the stoppage of a crowd of passengers and a long line of vehicles.

The main business of the city, where the principal stores, warehouses, offices, and public buildings are situated, is in the southern division of the city; and a large number of the persons who do business there reside in the northern or the western division, or in the suburbs.

While this is the condition of business in the city on the land, the river and its branches are crowded with vessels of all kinds, sailing craft and steamers, boats, barges, and tugs, moving backwards and forwards, and loading and unloading. Along the banks there are docks, warehouses, elevators, and all the appliances for shipping and reshipping goods. To these vessels the unrestricted navigation of the river and its branches is of the utmost importance; while to those who are compelled to cross the river and its branches the bridges are a necessity. The object of wise legislation is to give facilities to both, with the least obstruction to either. This the city of Chicago has endeavored to do.

The State of Illinois, within which, as already mentioned, the river and its branches lie, has vested in the authorities of the city jurisdiction over bridges within its limits, their con-

struction, repair, and use, and empowered them to deepen, widen, and change the channel of the stream, and to make regulations in regard to the times at which the bridges shall be kept open for the passage of vessels.

Acting upon the power thus conferred, the authorities have endeavored to meet the wants of commerce with other States, and the necessities of the population of the city residing or doing business in different sections. For this purpose they have prescribed as follows: that "Between the hours of six and seven o'clock in the morning, and half-past five and half-past six o'clock in the evening, Sundays excepted, it shall be unlawful to open any bridge within the city of Chicago;" and that "During the hours between seven o'clock in the morning and half-past five o'clock in the evening, it shall be unlawful to keep open any bridge within the city of Chicago for the purpose of permitting vessels or other crafts to pass through the same, for a longer period at any one time than ten minutes, at the expiration of which period it shall be the duty of the bridge-tender or other person in charge of the bridge to display the proper signal, and immediately close the same, and keep it closed for fully ten minutes for such persons, teams, or vehicles as may be waiting to pass over, if so much time shall be required; when the said bridge shall again be opened (if necessary for vessels to pass) for a like period, and so on alternately (if necessary) during the hours last aforesaid; and in every instance where any such bridge shall be open for the passage of any vessel, vessels, or other craft, and closed before the expiration of ten minutes from the time of opening, said bridge shall then, in every such case, remain closed for fully ten minutes, if necessary, in order to allow all persons, teams, and vehicles in waiting to pass over said bridge."

The first of these requirements was called for to accommodate clerks, apprentices, and laboring men seeking to cross the bridges, at the hours named, in going to and returning from their places of labor. Any unusual delay in the morning would derange their business for the day, and subject them to a corresponding loss of wages. At the hours specified there is three times — so the record shows — the usual number of pedestrians going and returning that there is during other hours.

The limitation of ten minutes for the passage of the draws by vessels seems to have been eminently wise and proper for the protection of the interests of all parties. Ten minutes is ample time for any vessel to pass the draw of a bridge, and the allowance of more time would subject foot-passengers, teams, and other vehicles to great inconvenience and delays.

The complainant principally objects to this ten minutes' limitation, and to the assignment of the morning and evening hour to pedestrians and vehicles. It insists that the navigation of the river and its branches should not be thus delayed; and that the rights of commerce by vessels are paramount to the rights of commerce by any other way.

But in this view the complainant is in error. The rights of each class are to be enjoyed without invasion of the equal rights of others. Some concession must be made on every side for the convenience and the harmonious pursuit of different occupations. Independently of any constitutional restrictions, nothing would seem more just and reasonable, or better designed to meet the wants of the population of an immense city, consistently with the interests of commerce, than the ten minutes' rule, and the assignment of the morning and evening hours which the city ordinance has prescribed.

The power vested in the general government to regulate interstate and foreign commerce involves the control of the waters of the United States which are navigable in fact, so far as it may be necessary to insure their free navigation, when by themselves or their connection with other waters they form a continuous channel for commerce among the States or with foreign countries. *The Daniel Ball*, 10 Wall. 557. Such is the case with the Chicago River and its branches. The common-law test of the navigability of waters, that they are subject to the ebb and flow of the tide, grew out of the fact that in England there are no waters navigable in fact, or to any great extent, which are not also affected by the tide. That test has long since been discarded in this country. Vessels larger than any which existed in England, when that test was established, now navigate rivers and inland lakes for more than a thousand miles beyond the reach of any tide. That test only becomes important when considering the rights of riparian owners to

the bed of the stream, as in some States it governs in that matter.

The Chicago River and its branches must, therefore, be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation.

But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority. They are the first to see the importance of such means of internal communication, and are more deeply concerned than others in their wise management. Illinois is more immediately affected by the bridges over the Chicago River and its branches than any other State, and is more directly concerned for the prosperity of the city of Chicago, for the convenience and comfort of its inhabitants, and the growth of its commerce. And nowhere could the power to control the bridges in that city, their construction, form, and strength, and the size of their draws, and the manner and times of using them, be better vested than with the State, or the authorities of the city upon whom it has devolved that duty. When its power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the State and that of the Federal government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it, as the supreme law of the land. But until Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary. This doctrine has been recognized from the earliest period, and approved in repeated cases, the most notable of which are *Willson* v. *The Black Bird Creek Marsh Co.*, 2 Pet. 245, decided in 1829, and *Gilman* v. *Philadelphia*, 3 Wall. 713, decided in 1865. In the first of these cases, an act of Delaware incorporated the com-

pany, and authorized it to construct over one of the small navigable rivers of the State a dam which obstructed the navigation of the stream. A sloop, licensed and enrolled according to the navigation laws of the United States, broke and injured the dam, and thereupon an action was brought for damages by the company. The owners of the sloop set up that the river was a public and common navigable creek "in the nature of a highway," in which the tides had always flowed and reflowed, and in which there was, and of right ought to be, a common and public way for all the citizens of the State of Delaware and of the United States, with sloops and other vessels to navigate at all times of the year at their free will and pleasure; that the company had wrongfully erected the dam across the navigable creek and thereby obstructed the same; and that they had broken the dam in order to pass along the creek with their sloop. To this plea the company demurred, and the demurrer was sustained by the Court of Appeals of Delaware and by this court. The decision here was based entirely upon the absence of any legislation of Congress upon the subject. Said Chief Justice Marshall, speaking for the court: "The measure authorized by this act (of Delaware) stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance. The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States 'to regulate commerce with foreign nations and among the several States.' If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks, into which the tide flows, and which abound throughout the lower country of the middle and southern States, we should feel not much difficulty in saying that a State law, coming in conflict with such act, would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power of Congress to regulate commerce with foreign nations and among the several

States, a power which has not been so exercised as to affect the question."

The second case mentioned, that of *Gilman* v. *Philadelphia*, is equally emphatic and decisive. The complaint there was by a citizen of New Hampshire, who owned valuable coal wharves on the Schuylkill River at Philadelphia, just above Chestnut Street in that city. In 1857 the legislature of the State authorized the city of Philadelphia to erect a permanent bridge over the river at that street. The city being about to begin the structure, which was to be without a draw, Gilman filed a bill to prevent its erection, alleging that it would be an unlawful obstruction of the navigation of the river, and an illegal interference with his rights, and a public nuisance, producing to him special damage, and that it was not competent for the legislature of Pennsylvania to sanction such a structure; and he claimed that he was entitled to be protected by an injunction to stay the progress of the work, and to a decree of abatement, if it should be proceeded with to completion. It appeared that the river was tide-water, and navigable to his wharves for vessels drawing from eighteen to twenty feet of water, and that for many years commerce to them had been carried on in all kinds of vessels. The bridge, which was to be constructed below them, was to be only thirty feet high; hence would not permit the passage of vessels with masts. The city justified its proposed action by the act of the legislature, alleging that the bridge was a necessity for public convenience, a large population residing on both sides of the river. The Circuit Court dismissed the bill, and this court affirmed the decree, holding that as the river was wholly within her limits, the State had not exceeded the bounds of her authority, and that until the dormant power of the Constitution was awakened and made effective by appropriate legislation, the reserved power of the State was plenary, and its exercise in good faith could not be made the subject of review by the court. In its opinion, after observing "that it must not be forgotten that bridges, which are connecting parts of turnpikes, streets, and railroads, are means of commercial transportation as well as navigable waters, and that the commerce which passed over a bridge may be much greater than would ever be transported on the water

obstructed," the court said, speaking by Mr. Justice Swayne: "It is for the municipal power to weigh the considerations which belong to the subject and to decide which shall be preferred, and how far either shall be made subservient to the other. The States have always exercised this power, and from the nature and objects of the two systems of government, they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress, whenever the power of the State shall be exerted within the sphere of the commercial power which belongs to the nation."

These decisions have been cited, approved, and followed in many cases, notably in that of *Pound* v. *Turck*, decided in 1877. 95 U. S. 459. There, a statute of Wisconsin authorized the erection of one or more dams across the Chippewa River, which was a small navigable stream lying wholly within the limits of the State, but emptying its waters into the Mississippi; and also the building and maintaining of booms on the river with sufficient piers to stop and hold floating logs. The dams and booms were to be so built as not to obstruct the running of lumber-rafts on the river. Certain parties were damaged by delay in a lumber-raft and from its breaking, caused by the obstructions in the river; and their assignees in bankruptcy brought an action against those who had placed the obstructions there, and recovered. The case being brought here, this court was of opinion that the somewhat confused instructions of the Circuit Court must have led the jury to understand, that if the structures of the defendant were a material obstruction to the general navigation of the river, the statute of the State afforded no defence, although the structures were built in strict conformity with its provisions. The Circuit Court evidently acted upon the theory that the State possessed no power to pass the statute because of its supposed conflict with the commercial power of Congress. This court thus construing the instructions of that court, held that they were erroneous, that the case was within the decisions of the Black Bird Creek Marsh case, and *Gilman* v. *Philadelphia*, and that it was competent for the legislature of the State to impose such regulations and limitations upon the erection of obstructions like dams and booms in navigable streams wholly

within its limits, as might best accommodate the interests of all concerned, until Congress should interfere and by appropriate legislation control the matter.

The doctrine declared in these several decisions is in accordance with the more general doctrine now firmly established, that the commercial power of Congress is exclusive of State authority only when the subjects upon which it is exercised are national in their character, and admit and require uniformity of regulation affecting alike all the States. Upon such subjects only that authority can act which can speak for the whole country. Its non-action is therefore a declaration that they shall remain free from all regulation. *Welton* v. *State of Missouri*, 91 U. S. 275; *Henderson* v. *Mayor of New York*, 92 id. 259; *County of Mobile* v. *Kimball*, 102 id. 691.

On the other hand, where the subjects on which the power may be exercised are local in their nature or operation, or constitute mere aids to commerce, the authority of the State may be exerted for their regulation and management until Congress interferes and supersedes it. As said in the case last cited: "The uniformity of commercial regulations which the grant to Congress was designed to secure against conflicting State provisions, was necessarily intended only for cases where such uniformity is practicable. Where, from the nature of the subject or the sphere of its operation, the case is local and limited, special regulations, adapted to the immediate locality, could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the State authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done in respect to them, but is rather to be deemed a declaration that for the time being and until it sees fit to act they may be regulated by State authority."

Bridges over navigable streams, which are entirely within the limits of a State, are of the latter class. The local authority can better appreciate their necessity, and can better direct the manner in which they shall be used and regulated than a gov-

ernment at a distance. It is, therefore, a matter of good sense and practical wisdom to leave their control and management with the States, Congress having the power at all times to interfere and supersede their authority whenever they act arbitrarily and to the injury of commerce.

It is, however, contended here that Congress has interfered, and by its legislation expressed its opinion as to the navigation of Chicago River and its branches; that it has done so by acts recognizing the ordinance of 1787, and by appropriations for the improvement of the harbor of Chicago.

The ordinance of 1787 for the government of the territory of the United States northwest of the Ohio River, contained in its fourth article a clause declaring that, "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between them, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor."

The ordinance was passed July 13, 1787, one year and nearly eight months before the Constitution took effect; and although it appears to have been treated afterwards as in force in the territory, except as modified by Congress, and by the act of May 7, 1800, c. 41, creating the Territory of Indiana, and by the act of Feb. 3, 1809, c. 13, creating the Territory of Illinois, the rights and privileges granted by the ordinance are expressly secured to the inhabitants of those Territories; and although the act of April 18, 1818, c. 67, enabling the people of Illinois Territory to form a constitution and State government, and the resolution of Congress of Dec. 3, 1818, declaring the admission of the State into the Union, refer to the principles of the ordinance according to which the constitution was to be formed, its provisions could not control the authority and powers of the State after her admission. Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a State of the Union. On her admission she at once became entitled to and

possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them. The language of the resolution admitting her is "on an equal footing with the original States *in all respects whatever*." 3 Stat. 536. Equality of constitutional right and power is the condition of all the States of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Black Bird Creek, and Pennsylvania over the Schuylkill River. *Pollard's Lessee* v. *Hagan*, 3 How. 212; *Permoli* v. *First Municipality*, id. 589; *Strader* v. *Graham*, 10 id. 82.

But aside from these considerations, we do not see that the clause of the ordinance upon which reliance is placed materially affects the question before us. That clause contains two provisions: one, that the navigable waters leading into the Mississippi and the St. Lawrence shall be common highways to the inhabitants; and the other, that they shall be forever free to them without any tax, impost, or duty therefor. The navigation of the Illinois River is free, so far as we are informed, from any tax, impost, or duty, and its character as a common highway is not affected by the fact that it is crossed by bridges. All highways, whether by land or water, are subject to such crossings as the public necessities and convenience may require, and their character as such is not changed, if the crossings are allowed under reasonable conditions, and not so as to needlessly obstruct the use of the highways. In the sense in which the terms are used by publicists and statesmen, free navigation is consistent with ferries and bridges across a river for the transit of persons and merchandise as the necessities and convenience of the community may require. In *Palmer* v. *Commissioners of Cuyahoga County* we have a case in point. There application was made to the Circuit Court of the United States in Ohio for an injunction to restrain the erection of a drawbridge over a river in that State on the ground that it would obstruct the navigation of the stream and injure the property of the plaintiff. The application was founded on the provision of the fourth article of the ordinance mentioned. The court, which was presided over by Mr. Justice McLean,

then having a seat on this bench, refused the injunction, observing that "This provision does not prevent a State from improving the navigableness of these waters, by removing obstructions, or by dams and locks, so increasing the depth of the water as to extend the line of navigation. Nor does the ordinance prohibit the construction of any work on the river which the State may consider important to commercial intercourse. A dam may be thrown over the river, provided a lock is so constructed as to permit boats to pass with little or no delay, and without charge. A temporary delay, such as passing a lock, could not be considered as an obstruction prohibited by the ordinance." And again: "A drawbridge across a navigable water is not an obstruction. As this would not be a work connected with the navigation of the river, no toll, it is supposed, could be charged for the passage of boats. But the obstruction would be only momentary, to raise the draw: and as such a work may be very important in a general intercourse of a community, no doubt is entertained as to the power of the State to make the bridge." 3 McLean, 226. The same observations may be made of the subsequent legislation of Congress declaring that navigable rivers within the Territories of the United States shall be deemed public highways. Sect. 9 of the act of May 18, 1796, c. 29; sect. 6 of the act of March 26, 1804, c. 35.

As to the appropriations by Congress, no money has been expended on the improvement of the Chicago River above the first bridge from the lake, known as Rush Street Bridge. No bridge, therefore, interferes with the navigation of any portion of the river which has been thus improved. But, if it were otherwise, it is not perceived how the improvement of the navigability of the stream can affect the ordinary means of crossing it by ferries and bridges. The free navigation of a stream does not require an abandonment of those means. To render the action of the State invalid in constructing or authorizing the construction of bridges over one of its navigable streams, the general government must directly interfere so as to supersede its authority and annul what it has done in the matter.

It appears from the testimony in the record that the money appropriated by Congress has been expended almost exclu-

sively upon what is known as the outer harbor of Chicago, a part of the lake surrounded by breakwaters. The fact that formerly a light-house was erected where now Rush Street bridge stands in no respect affects the question. A ferry was then used there; and before the construction of the bridge the site as a light-house was abandoned. The existing light-house is below all the bridges. The improvements on the river above the first bridge do not represent any expenditure of the government.

From any view of this case, we see no error in the action of the court below, and its decree must accordingly be

Affirmed.

TRANSPORTATION COMPANY v. PARKERSBURG.

1. The city of Parkersburg built within its limits a wharf on the bank of the Ohio River, and prescribed by ordinance certain rates of wharfage on vessels "that may discharge or receive freight, or land on or anchor at or in front of any public landing or wharf belonging to the city, for the purpose of discharging or receiving freight." A transportation company, owning duly enrolled and licensed steamers, which ply between Pittsburgh and Cincinnati and touch at the intermediate points, complained that the wharfage was extortionate, and was merely a pretext for levying a duty of tonnage. The company thereupon filed a bill in the Circuit Court, praying that the prosecution of a suit brought by the city in the State court to collect the wharfage be enjoined, and that the ordinance be declared void, and that other relief be granted. *Held*, that the character of the charges must be determined by the ordinance itself; and as it on its face imposed them for the use of the wharf only, and not for entering the port or lying at anchor in the river, the court, though it might deem them unreasonable and exorbitant, will not entertain an averment that they were intended as a duty of tonnage, nor inquire into the secret purpose of the body imposing them.
2. Wharfage is the compensation which the owner of a wharf demands for the use thereof; a duty of tonnage is a charge for the privilege of entering, or loading at or lying in, a port or harbor, and can be laid only by the United States.
3. The question as to which of these classes, if either, a charge against a vessel or its owner belongs, is one, not of intent, but of fact and law: of fact, whether the charge is imposed for the use of a wharf, or for the privilege of entering a port; of law, whether, upon the facts which are shown to exist, it is wharfage or a duty of tonnage.

4. Although wharves are related to commerce and navigation as aids and conveniences, yet being local in their nature, and requiring special regulations at particular places, the jurisdiction and control thereof, in the absence of congressional legislation on the subject, properly belong to the States in which they are situated.
5. A suit for relief against exorbitant wharfage cannot, as one arising under the Constitution or the laws of the United States, be maintained in the Circuit Court, even though it be alleged that the wharfage was intended as a duty of tonnage; the alleged intent not being traversable.

APPEAL from the Circuit Court of the United States for the District of West Virginia.

The case is stated in the opinion of the court.

Mr. Milton I. Southard and *Mr. C. W. Moulton* for the appellant.

Mr. W. A. Cook and *Mr. C. C. Cole* for the appellees.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is an appeal from a decree dismissing a bill in chancery on demurrer. The complainant below, who is appellant here, according to the statements of the bill, is a corporation of West Virginia, organized for the purpose of carrying on a transportation business on the Ohio River, together with a general wharf and commission business; its principal office being located at the city of Parkersburg. It is the owner of several steamboats duly enrolled and licensed under the acts of Congress, and plying between Pittsburgh, Wheeling, Parkersburg, Cincinnati, and Covington. The bill was filed against the city of Parkersburg and its recorder and wharfmaster, to restrain the collection of certain demands for wharfage, and to recover back money previously paid on that account. It is contended that the city ordinance, under which the wharfage was demanded, is in conflict with the Constitution of the United States; and this is the ground on which the jurisdiction of the Circuit Court of the United States was invoked. The bill alleges that many years ago the city of Parkersburg caused to be constructed on the banks of the Ohio River at that place a wharf or public landing, to be used by the various steamboats trading on the river and landing at said city; and that said wharf is still controlled by the city under a certain ordinance passed by the mayor and common council in March, 1865, a copy of

which was filed with the bill. By this ordinance it is ordained that every steamboat, keel-boat, barge, flat-boat, and flat (except ferry-boats) that may discharge or receive freight, or land on or anchor at or in front of any public landing or wharf belonging to the city, or at which the city may lawfully charge and receive wharfage, for the purpose of discharging or receiving freight, shall pay the city for wharfage the following sums or rates for each respectively, to wit: On steamboats of less than 100 tons burden, three dollars for the first twenty-four hours or any part thereof, and one dollar and fifty cents for every subsequent twenty-four hours or any part thereof. On steamboats of 100 and less than 150 tons, three dollars and seventy-five cents for the first, and two dollars for every subsequent twenty-four hours or any part thereof; and so on, regulating the charges according to the tonnage, and reducing them where only a small quantity of freight is discharged or received. Provision is then made for recovering the wharfage by bringing the parties before the recorder or a justice of the peace.

The bill alleges that under and by virtue of this ordinance the city of Parkersburg has, ever since the organization of the complainant, required it and its agents to pay the charges provided in the ordinance for all the steamboats owned or controlled by it, which have discharged or received freight or passengers, or landed at the said wharf, and that the payments have been made under protest.

The bill then makes the following charge: —

"Your orator further alleges that, as it is advised and believes, the said ordinance is wholly null and void, and is in conflict with those provisions of the Constitution of the United States relating to the regulations of inter-state commerce and prohibiting any State, without the consent of Congress, from laying any duty of tonnage; and that the operation of the same tends to and does abridge the free use of the Ohio River by your orator, to which it is legally entitled by virtue of the enrolment and license of its steamboats under the laws of the United States as aforesaid. As by reference to said ordinance will appear, the rates of charges made by said city of Parkersburg upon steamboats landing at or in front of the wharf of said city

are based upon and regulated solely by the 'tons burden' of said boats, and said charges are made indiscriminately, whether the boat lands or anchors at or in front of any public landing or wharf of said city. And your orator further avers that the Congress of the United States has never given its consent to the passage or enforcement of said ordinance, but, on the contrary, tonnage duties are expressly prohibited by sect. 4220 of the Revised Statutes of the United States to be levied upon enrolled or licensed vessels trading from one port in the United States to another port within the same."

The bill further alleges that the rates charged by the ordinance are unreasonable, extortionate, and oppressive, and are made and levied as a tax upon commerce for the express purpose (under the assumed pretence of wharfage dues) of replenishing its treasury and increasing its revenue; that the cost of the wharf has been collected over and over again; that it is allowed to remain in bad repair; and that the wharfage dues collected have been used for other city purposes, paying its debts, &c.; that in the year 1876 over $2,700 was collected from various boats and vessels, less than $50 of which was spent on the wharf; and the same thing in other years. These facts are stated for the purpose of showing the extortionate character of the ordinance, and that it is used for the purpose of laying duties and imposts on imports and exports.

The bill further shows that for the recent refusal of the complainant to pay these wharfage charges the city of Parkersburg has instituted suits against it before the recorder under said ordinance; wherefore it prays a decree to restrain all further proceedings against the complainant by said suits or otherwise, from enforcing any judgment recovered by the city for the violation of said ordinance, or otherwise interfering with the rights of the complainant to the free use of the Ohio River by means of its steamboats; and for the recovery of moneys already exacted from it under said ordinance, amounting to over $2,000; and that the ordinance may be declared null and void.

To this bill the defendants demurred, and upon argument of the demurrer the bill was dismissed. From that decree the present appeal is taken.

If sect. 720 of the Revised Statutes, which declares that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State," applies to suits originally brought in the Circuit Courts by virtue of the act of March 3, 1875, c. 137, in cases arising "under the Constitution or laws of the United States," it is clear that so much of the bill in this case as prays for an injunction to restrain legal proceedings already instituted before the recorder of Parkersburg before it was filed, cannot be maintained. But that portion of the bill which seeks to have the wharfage ordinance declared void, and to restrain any further collections under it, and any further interference with the right of the complainant to the free navigation of the Ohio River, is not open to this objection; and perhaps the demand for a return of the wharfage already paid (although itself of a legal nature), may come in as incidental to the other relief. The main question to be solved is, whether, as contended by the complainant, the ordinance is void as being in violation of the Constitution or any law of the United States.

It is conceded by the bill that the wharf for the use of which the charges are made, though public in the sense of being open to the use of the public, belongs to the city of Parkersburg; that it was built and is maintained by the city as its property; and the ordinance on its face shows that the charges imposed for landing at or using it are imposed as and for wharfage, and nothing else. It may be extortionate in amount; but it is wharfage. The allegations of the bill that it is not real wharfage, but a duty of tonnage, in the name and under the pretext of wharfage, cannot be received against the terms of the ordinance itself. This would open the door to an inquiry, in every case of wharfage alleged to be unreasonable, which would lead to great inconvenience and confusion. Neither courts nor juries would have any practicable criterion by which to judge of the secret intent with which the charge was made, whether as wharfage or as a duty of tonnage. Such an inquiry, if allowed, would bring into question not only the intent of municipal, but of legislative bodies. When the question is one of reasonable or unreasonable wharfage, we know what to do with it. It is a question known to the laws; and the modes of

redress for unreasonable wharfage are fixed and settled. But whether a charge imposed is a charge of wharfage, or a duty of tonnage, must be determined by the terms of the ordinance or regulation which imposes it. They are not the same thing: a duty of tonnage is a charge for the privilege of entering, or trading or lying in, a port or harbor; wharfage is a charge for the use of a wharf. Exorbitant wharfage may have a similar effect as a burden on commerce as a duty of tonnage has; but it is exorbitant wharfage, and not a duty of tonnage; and the remedy for the one is different from the remedy for the other. The question whether it is the one or the other is not one of intent, but one of fact and law: of fact, as whether the charge is made for the use of a wharf, or for entering the port; of law, as whether, according as the fact is shown to exist, it is wharfage or a duty of tonnage. The intent is not material, and is not traversable. It is not like the case of a deed absolute on its face, but intended as a mortgage; there, the intent is the result of an agreement between the parties, which may be proved, and which it would operate as a fraud on one of the parties not to allow to be proved. Nor is it like the case of a mistake in an instrument, by which the intent of the parties is contravened: in that case, also, the actual agreement between them may be shown for the purpose of correcting the instrument. Nor is it like the case of an intent to deceive or defraud or to commit a crime: there, the intent is a material part of the offence charged; whilst in the present case a supposed intent is suggested for the purpose of making of one act, another and a different act. It is, in truth, more like the case of an averment to contradict the express terms of a written instrument by parol.

It is contended, indeed, that the terms of the ordinance in question show that it was intended to exact a duty of tonnage, and is not confined to the prescription of charges for wharfage; and the words "anchor at *or in front of* any public landing or wharf," as describing vessels to be charged, are relied on as sustaining this view, since, as contended, they embrace vessels not using the wharf. But we do not understand this to be the meaning and effect of the words. The whole phrase should be taken together, and thus read, it is evidently confined to vessels

using or intending to use the wharf. The passage consists of two distinct clauses: 1. "Every steamboat that may discharge or receive freight at any public landing or wharf;" 2. "or that may land on or anchor at or in front of any public landing or wharf for the purpose of discharging or receiving freight." The last clause as well as the first evidently points to those vessels only which land or anchor at or before a wharf for the purpose of using it. Sometimes it may happen that the depth of water in the river, or intervening vessels lying at the wharf, will not allow a vessel to get close alongside of the wharf, and yet she may desire to connect with it in some manner, by planks or by the deck of an intervening boat, barge, or float, so as to discharge or receive freight and passengers upon or from the wharf. Such cases are properly described by the language used; and we have no evidence that any other construction has been given to it. The complainant does not allege that the supposed obnoxious application of the ordinance has ever been made against any of its vessels, or against any vessels. The charge of the bill is only "that under and by virtue of said ordinance, the city of Parkersburg has, ever since the time of organization of your orator, required your orator, its agents and servants, to pay to it the charges provided in said ordinance for all steamboats owned or controlled by your orator that have discharged or received freight or passengers, or landed at its said wharf." There is no complaint that wharfage has been exacted when the complainant's vessels have merely anchored in the stream, or have moored at any other place than the city's wharf; or when they have stopped at or in front of the wharf itself for any other purpose than that of discharging or receiving freight and passengers. This makes the case a very different one from that which was presented in *Cannon* v. *New Orleans*, 20 Wall. 577. There the ordinance objected to imposed levee duties "on all steamboats which shall moor or land in any part of the port of New Orleans;" and this court could do no otherwise than hold that such an ordinance had the effect of laying a duty of tonnage, against the express prohibition of the Constitution. The same view had previously been taken of an act of the legislature of Louisiana, authorizing the port wardens of New Orleans to demand and receive five dollars from

every vessel arriving in that port, whether called on to perform any service or not, *Steamship Company* v. *Port Wardens*, 6 Wall. 31; and of a law of Texas, which required every vessel arriving at the quarantine station of any town on the coast of Texas to pay five dollars for the first hundred tons, and one and a half cents for each additional ton. *Peete* v. *Morgan*, 19 id. 581. So, when a law of New York required all vessels of a certain class which should enter the port of New York, or load or unload, or make fast to any wharf therein, to pay a certain rate per ton, this was held to be an unconstitutional imposition, because it applied to all vessels, whether they used a wharf or not. *Inman Steamship Co.* v. *Tinker*, 94 U. S. 238. All these were clear cases of duty on tonnage as distinguished from wharfage; and the terms of the ordinances and laws in question were very different from those of the ordinance now under consideration. We think it very clear that the ordinance in question cannot be regarded as imposing any other charge than that of wharfage. The fact that the rates charged are graduated by the size or tonnage of the vessel is of no consequence in this connection. This does not make it a duty of tonnage in the sense of the Constitution and the acts of Congress. So we have expressly decided in several recent cases. *Cannon* v. *New Orleans*, 20 Wall. 577; *Packet Company* v. *Keokuk*, 95 U. S. 80; *Packet Company* v. *St. Louis*, 100 id. 423; *Guy* v. *Baltimore*, id. 434; *Packet Company* v. *Catlettsburg*, 105 id. 559. When the Constitution declares that "No State shall, without the consent of Congress, lay any duty of tonnage;" and when Congress, in sect. 4220 of the Revised Statutes, declares that "No vessel belonging to any citizen of the United States, trading from one port within the United States to another port within the United States, or employed in the bank, whale, or other fisheries, shall be subject to tonnage tax or duty, if such vessel be licensed, registered, or enrolled,"— they mean by the phrases, "duty of tonnage," and "tonnage tax or duty," a charge, tax, or duty on a vessel for the privilege of entering a port; and although usually levied according to tonnage, and so acquiring its name, it is not confined to that method of rating the charge. It has nothing to do with wharfage, which is a charge against a vessel for using or lying

at a wharf or landing. The one is imposed by the government, the other by the owner of the wharf or landing. The one is a commercial regulation, dictated by the general policy of the country upon considerations having reference to its commerce or revenue; the other is a rent charged by the owner of the property for its temporary use. It is obvious that the mode of rating the charge in either case, whether according to the size or capacity of the vessel, or otherwise, has nothing to do with its essential nature. It is also obvious that since a wharf is property, and wharfage is a charge or rent for its temporary use, the question whether the owner derives more or less revenue from it, or whether more or less than the cost of building and maintaining it, or what disposition he makes of such revenue, can in no way concern those who make use of the wharf and are required to pay the regular charges therefor; provided, always, that the charges are reasonable and not exorbitant.

It is undoubtedly a general rule of law, in reference to all public wharves, that wharfage must be reasonable. A private wharf, that is, a wharf which the owner has constructed and reserves for his private use, is not subject to this rule; for, if any other person wishes to make use of it for a temporary purpose, the parties are at liberty to make their own bargain. That such wharves may be had and owned, even on a navigable river, is not open to controversy. It was so decided by this court in *Dutton* v. *Strong*, 1 Black, 23, and in *Yates* v. *Milwaukee*, 10 Wall. 497. Whether a private wharf may be maintained as such, where it is the only facility of the kind in a particular port or harbor, may be questioned. Sir Matthew Hale says: "If the King or subject have a public wharf unto which all persons that come to that port must come and unlade or lade their goods as for the purpose because they are the wharves only licensed by the King, according to the statutes of 1 Eliz., cap. 11, or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, &c.; neither can they be inhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the King's license or charter." Hargrave's L. T. 77.

Be this, however, as it may, it is an undoubted rule of universal application that wharfage for the use of all public wharves must be reasonable. But then the question arises, by what law is this rule established, and by what law can it be enforced? By what law is it to be decided whether the charges imposed are, or are not, extortionate? There can be but one answer to these questions. Clearly it must be by the local municipal law, at least until some superior or paramount law has been prescribed. At Parkersburg it is the law of West Virginia. The rule referred to is a rule of the common law undoubtedly, but it has force in West Virginia because the common law is the law of that State, and not because it is the law of the United States. The courts of the United States do not enforce the common law in municipal matters in the States because it is Federal law, but because it is the law of the State.

We have said that the reasonableness of wharfage must be determined by the local law until some paramount law has been prescribed. By this we mean, that until the local law is displaced or overruled by paramount legislation adopted by Congress, the courts have no other guide, no other law to administer on the subject than the local or State law. Our system of government is of a dual character, State and Federal. The States retain general sovereignty and jurisdiction over all local matters within their limits; but the United States, through Congress, is invested with supreme and paramount authority in the regulation of commerce with foreign nations and among the several States. This has been held to embrace the regulation of the navigable waters of the United States, of which the Ohio River is one. In the exercise of this authority over navigable waters Congress has, from the commencement of the government, erected light-houses, break-waters, and piers, not only on the sea-coast, but in the navigable rivers of the country; and has improved the navigation of rivers by dredging and cleaning them, and making new channels and jetties, and adopting every other means of making them more capable of meeting the growing and extending demands of commerce. It has extended its supervision in an especial manner to the Ohio River. Amongst other things, it has overcome the obstacle presented by the falls at Louisville by the construction of an

expensive canal. It has created ports of delivery along the river, of which the city of Parkersburg itself is one, and others are at Pittsburgh, Wheeling, Cincinnati, Louisville, Madison, Jeffersonville, New Albany, Evansville, Paducah, and Cairo. It has regulated the bridges which have been thrown across the river by authority of the States. It authorized the Wheeling bridge to stand, after this court had declared it to be a nuisance; requiring the officers of all vessels to regulate their pipes and chimneys so as not to interfere with the bridge, 10 Stat. 112; thus extending its common protection to commerce by land and commerce by water. It required the Newport and Cincinnati bridge to be removed or placed at a greater height above the water, after having been constructed in accordance with the laws of the States and of the United States. 16 id. 572.

Now wharves, levees, and landing-places are essential to commerce by water, no less than a navigable channel and a clear river. But they are attached to the land; they are private property, real estate; and they are primarily, at least, subject to the local State laws. Congress has never yet interposed to supervise their administration; it has hitherto left this exclusively to the States. There is little doubt, however, that Congress, if it saw fit, in case of prevailing abuses in the management of wharf property, — abuses materially interfering with the prosecution of commerce, — might interpose and make regulations to prevent such abuses. When it shall have done so, it will be time enough for the courts to carry its regulations into effect by judicial proceedings properly instituted. But until Congress has acted, the courts of the United States cannot assume control over the subject as a matter of Federal cognizance. It is Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce with foreign nations and among the several States. The courts can never take the initiative on this subject.

There are cases, it is true, which are so national in their character, and in which it is so essential that a general or national rule should exist, that any interference by the State legislatures therewith is justly deemed to be an invasion of the power and authority of the general government; and in such cases the courts will interpose to prevent or redress the

commission of acts done or attempted to be done under the authority of such unconstitutional laws. In such cases, the non-action or silence of Congress will be deemed to be an indication of its will that no exaction or restraint shall be imposed. Such is the import of the various passenger cases in which this court has pronounced unconstitutional any tax, duty, or other exaction imposed by the States upon emigrants landing in the country. Such is also the import of those cases in which it has been held that State laws imposing discriminating burdens upon the persons or products of other States are unconstitutional; it being deemed the intent of Congress that inter-state commerce shall be free, where it has not itself imposed any restrictions thereon. See *Passenger Cases*, 7 How. 283, 462; *Cooley* v. *Board of Wardens*, 12 id. 299, 319; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Crandall* v. *State of Nevada*, 6 id. 42; *Ward* v. *Maryland*, 12 id. 418, 432; *Case of the State Freight Tax*, 15 id. 232, 279; *Welton* v. *State of Missouri*, 91 U. S. 275; *Henderson* v. *Mayor of New York*, 92 id. 259, 272; *People* v. *Compagnie Générale Transatlantique*, *ante*, p. 59.

But the case before us is not one of the kind referred to. Though the use of public wharves may be regulated by Congress as a part of the commercial power, it certainly does not belong to that class of subjects which are in their nature national, requiring a single uniform rule, but to that class which are in their nature local, requiring a diversity of rules and regulations. To quote the words of Mr. Justice Curtis in *Cooley* v. *Board of Wardens*, 12 How. 299, 319, "The power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question [which was pilotage], as imperatively demanding that diversity which alone can meet the local necessities of navigation. . . . Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws

for the regulation of pilots and pilotage is plain. The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits."

No words could be more fitly applied to the subject of the regulation of wharves than are here used by the court in reference to pilotage. It is true no act of Congress has relegated the subject of wharfage to the States, as was done in the case of pilotage; but this was not necessary: the regulation of wharves belongs *prima facie*, and in the first instance, to the States, and would only be assumed by Congress when its exercise by the States is incompatible with the interests of commerce; and Congress has never yet assumed to take that regulation into its own hands, or to interfere with the regulation of the States.

The power of the States to legislate in matters of a local character, where Congress has not by its own action covered the subject, is quite fully discussed by Mr. Justice Field in delivering the opinion of this court in *County of Mobile* v. *Kimball*, 102 U. S. 691, where the distinction taken in *Cooley* v. *Board of Wardens*, between those subjects which are national in their character and require uniformity of regulation, and those which are local and peculiar to particular places, is commented upon and enforced. Amongst other things, it is there said: "Where from the nature of the subject or the sphere of its operation the case is local and limited, special regulations adapted to the immediate locality could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the State authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a dec-

laration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by State authority." See also the remarks of the Chief Justice in *Hall* v. *De Cuir*, 95 U. S. 485.

It is not necessary to cite other cases. The principle laid down in *Cooley* v. *Board of Wardens* has become fully recognized and established in our jurisprudence; and it is manifest that no subject can be more properly classified as local in its nature, and as requiring the application of local regulations, than that of wharves and wharfage.

From this view, it is plain that the courts of the United States have no authority to ignore the State laws and regulations on the subject of wharves and wharfage, and to declare them invalid by reason of any supposed repugnancy to the Constitution or laws of the United States. As already remarked, the courts cannot take the initiative in this matter. Congress must first legislate before the courts can proceed upon any such ground of paramount jurisdiction. If the rates of wharfage exacted are deemed extortionate or unreasonable, the courts of the United States (in cases within their ordinary jurisdiction) as well as the courts of the States must apply and administer the State laws relating to the subject; and these laws will probably, in most cases, be found to be sufficient for the suppression of any glaring evils. At all events, there is not, at present, any Federal law on the subject by which relief can be obtained.

In the various bridge cases that have come before the courts of the United States, where bridges (or dams) have been erected by State authority across navigable streams, the refusal to interfere with their erection has always been based upon the absence of prohibitory legislation by Congress, and the power of the States over the subject in the absence of such legislation. Where the regulation of such streams by Congress has been only of a general character, such as the establishment of ports and collection districts thereon, it has been held that the erection of bridges, furnished with convenient draws, so as not materially to interfere with navigation, is within the power of the States, and not repugnant to such general regulation. The

former cases on this subject are reviewed in *Escanaba Company* v. *Chicago*, *ante*, p. 678.

It is believed that no case can be found in which State laws, or regulations under State authority, on subjects of a local nature, have been set aside on the ground of repugnance to the power of regulating commerce given to Congress, unless it has appeared that they were contrary to some express provision of the Constitution, or to some act of Congress, or that they amounted to an assumption of power exclusively conferred upon Congress.

In *Gibbons* v. *Ogden* it was held, that, as the navigation of all public waters of the United States is subject to the regulation of Congress, a license granted under the laws and by the authority of the United States to a steamboat to carry on the coasting trade entitled such boat to navigate all such waters, notwithstanding the existence of a State law granting to certain individuals the exclusive right to navigate a portion of said waters lying within the State; and that such exclusive grant was void as being repugnant to the regulation made by Congress. Chief Justice Marshall, delivering the opinion of the court in that case, said: "The court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which the act entitles him."

Subsequent cases which we have already cited in this opinion are to the same effect. *Crandall* v. *State of Nevada*, 6 Wall. 35; *Ward* v. *Maryland*, 12 id. 418; *Welton* v. *State of Missouri*, 91 U. S. 275; *Henderson* v. *Mayor of New York*, 92 id. 259; *People* v. *Compagnie Générale Transatlantique*, *ante*, p. 59.

State of Pennsylvania v. *Wheeling, &c. Bridge Co.*, 13 How. 518, was a peculiar case. The Wheeling bridge, as originally constructed, presented a complete obstacle to the passage of steamboats with high chimneys, such as navigated the Ohio River to and from Pittsburgh; and hence presented a case of interference with navigation analogous to that of the exclusive monopoly granted to Fulton and Livingston by the State of New York, which was the ground of complaint in the case of

Gibbons v. *Ogden*. But, besides this, it was a case in which this court exercised its original jurisdiction by reason of the character of the parties, a State being the complainant; and having jurisdiction on this ground, it was competent for the court to decide upon the lawfulness or unlawfulness of the structure in reference, not only to the laws of the United States, but also to the local municipal law, and to the general law relating to the mutual rights of the States. The charter granted to the Wheeling Bridge Company by the State of Virginia had expressly provided, "that if the said bridge shall be so constructed as to injure the navigation of said river, the said bridge shall be treated as a public nuisance, and shall be liable to abatement upon the same principles and in the same manner that other public nuisances are." In addition to this, an act was passed Dec. 18, 1789, by the State of Virginia, consenting to the erection of the State of Kentucky out of its territory on certain conditions, among which was one "that the use and navigation of the river Ohio, so far as the territory of the proposed State, or the territory that shall remain within the limits of this Commonwealth, lies thereon, shall be free and common to the citizens of the United States;" and to this the assent of Congress was given by the act of Feb. 4, 1791, c. 4. "This compact," the court said, "by the sanction of Congress, has become a law of the Union." Upon all these grounds, it was held that the State of Pennsylvania, having large interests which were affected by the erection of the bridge, was entitled to a decree for its prostration as a nuisance, unless such alterations should be made in its construction as to leave the navigation of the river unimpaired.

This case, therefore, cannot be relied on, any more than the other cases referred to, to show that the courts of the United States have any peculiar jurisdiction as such to vindicate the supposed rights of commerce and navigation against the laws of the States, in matters of a local nature, such as the regulation of wharfage is, where no express provision of the Constitution is violated, and no act of Congress has been passed to regulate the subject. As no act of Congress has been passed for the regulation of wharfage, and as there is nothing in the Constitution to prevent the States from regulating it, so long

as Congress sees fit to abstain from action on the subject, our conclusion is, that it is entirely within the domain, and subject to the operation, of the State laws.

The effect of this conclusion upon the present case is obvious. The gravamen of the bill is really nothing but a complaint against exorbitant rates of wharfage. These rates are established by a municipal body, itself the proprietor of the wharves, and professing to act under the authority of State law. It cannot be supposed that the law authorizes exorbitant charges to be made; but whether the charges exacted are exorbitant or not can only be determined by that law. It is clear, therefore, that the complainant in filing its bill in the United States court on the ground that the wharfage complained of is in violation of the Constitution or laws of the United States, has totally misconceived its rights, and the proper means of obtaining redress. Unless it has some other ground for coming into the Federal court, it must seek redress in the State courts; and whether the question of reasonableness of wharfage is submitted to the determination of the one forum or the other, it is only determinable by the laws of the State within whose jurisdiction the wharf is situated. Since the parties are all citizens of West Virginia, and since the case cannot be sustained as one "arising under the Constitution or laws of the United States," there was no error in the decree dismissing the bill of complaint. The decree of the Circuit Court is, therefore,

Affirmed.

MR. JUSTICE HARLAN dissenting.

The city of Parkersburg — which has been created a port of delivery in conformity with the laws of the United States — exacts and collects for the use of its wharf by boats engaged in commerce on the Ohio River certain fees or dues, called wharfage charges, which, pursuant to the ordinance of May 17, 1865, are, in every case, measured by the tonnage or capacity of the boat so using the wharf.

It is conceded by the demurrer to the bill that from these fees the city has long since been reimbursed for the actual cost of constructing the wharf; that the amount annually collected

from boats for its use is largely in excess of any expense incurred in its maintenance and repair; that it has been permitted to become and remain in bad repair, at times almost unfit for use; that nearly all the money so raised is applied by the city to increase its general revenue and pay its indebtedness; and, lastly, that the wharfage charges are unreasonable in amount and oppressive.

The opinion of the court, if I do not wholly misapprehend it, proceeds upon the broad ground that municipal wharfage charges, even where measured by the tonnage of the boat, and however much in excess of fair and reasonable compensation, are not duties of tonnage within the meaning of the Constitution, and that their exaction infringes no right given or secured by the Constitution or the existing statutes of the United States. If, however, such charges are duties of tonnage, or if their collection violates any right, so given or secured, then a case unquestionably arises under the Constitution or laws of the United States, of which the Circuit Court, under the act of March 3, 1875, c. 137, can take original jurisdiction, without reference to the citizenship of the parties.

I had supposed, and am still of opinion, that a vessel or boat, duly enrolled and licensed under the laws of the United States (as those of the appellant are conceded to be), and engaged in commerce upon the Ohio, a public navigable water, is entitled, in virtue of the Constitution and laws of the United States, to enter any port on that river, and also to land at any wharf established for public use, without being subjected (apart from mere police regulations) to any burden, tax, or duty therefor, beyond reasonable compensation to the owner of the wharf for its use.

Such I have understood to be the doctrine announced in *Cannon* v. *New Orleans*, 20 Wall. 577; *Packet Company* v. *Keokuk*, 95 U. S. 80; *Packet Company* v. *St. Louis*, 100 id. 423; *Vicksburg* v. *Tobin*, id. 430.

The court holds that Congress, under the power to regulate commerce with foreign nations and among the several States, may, by statute, provide for the protection, through the courts, of those engaged in commerce upon the public navigable waters of the United States against unreasonable charges for

the use of wharves by boats. But without further legislation, specifically directed to that end, the courts, I submit, should adjudge that local regulations, such as those adopted by the city of Parkersburg, are within the prohibition upon the States to lay any duty of tonnage, and are also inconsistent with the compact between Virginia and Kentucky which this court, in *State of Pennsylvania* v. *Wheeling, &c., Bridge Co.*, 13 How. 518, 564, declared had become, by the sanction of Congress, a law of the Union. In that compact it is declared that "the use and navigation of the river Ohio, so far as the territory of the proposed State, or the territory that shall remain within the limits of this Commonwealth [Virginia], lies thereon, shall be free and common to the citizens of the United States."

In the opinion of the court a duty of tonnage is defined to be a charge, tax, or duty on a vessel for the mere privilege of entering or lying in a port. The city of Parkersburg cannot, therefore, constitutionally impose a charge, tax, or duty upon, or for the exercise of, that privilege. Now, do the Constitution and the existing laws of the United States extend their protection no further than to secure the bare, naked right of entering a port free from local burdens or duties upon its exercise? May not the boat, in virtue of the Constitution and existing laws, also land at any wharf, at least at any public wharf, on the Ohio River for the purpose of discharging and receiving freight and passengers? Of what value would be the right to enter the port without the privilege of landing its passengers and freight? Is not the substantial privilege of landing passengers and freight necessarily involved in the right of entering the port? If so, it would seem that the right to land a boat at a public wharf on a navigable water of the United States is as fully protected by the Constitution and the existing laws of the United States as that of entering the port. A charge, tax, or duty imposed upon the exercise of the right to land is consequently, for every practical purpose, as much a duty of tonnage as a charge, tax, or duty upon the privilege of entering the port. The constitutional provision that "no State shall, without the consent of Congress, lay any duty of tonnage;" the power given Congress to regulate commerce among the States; the statutes of the United States, in the exercise of that

power, providing for licensing vessels, establishing ports of entry, and imposing duties and inflicting penalties upon officers of boats engaged in navigation; and the sanction by Congress of the compact between Virginia and Kentucky, declaring that the use and navigation of the Ohio River shall be free to all citizens of the United States, — give to the boats of the appellant the right to enter the port of Parkersburg and land at the wharf provided for the use of boats engaged in navigation. It is a right given and secured by the Constitution and the existing laws of the United States, and, therefore, one which the courts of the Union may protect against invasion or violation.

For its protection additional legislation does not seem to be necessary, since the Circuit Court has original jurisdiction of all suits arising under the Constitution and laws of the United States when the matter in dispute exceeds a prescribed amount.

These principles are entirely consistent with the city's ownership of the wharf and with the right to demand fair compensation for its use. As decided in the before-mentioned cases, the city may require all who use its wharf by landing thereat, or in any other way, to pay what such use is reasonably worth. It cannot, as the court states, rightfully demand more. Reasonable compensation for the use by boats of the additional facilities furnished to commerce by means of wharves, even when such compensation is measured by the capacity of the boats, is not, within the meaning of the Constitution and the laws of the United States, an infringement of the right of free commerce upon the public navigable waters of the United States. Upon this ground the wharfage charges imposed by the cities of St. Louis, Vicksburg, and Keokuk were sustained. But it is an entirely different matter when a municipal corporation assumes in effect, if not in terms, to burden the constitutional privilege of entering the port of any city, situated on a public navigable stream, with the condition that if the boats land at the public wharf of that city, it must submit to the payment of larger compensation for the use of that wharf than the corporation has the legal authority to demand. It requires no further legislation by Congress to enable the courts of the Union to protect

the rights of free commerce against exactions of that kind. It is, I think, their duty to adjudge all such local regulations to be in conflict with the supreme law of the land. To burden the exercise of a constitutional right with conditions which materially impair its value, or which, practically, compel the abandonment of the right rather than to submit to the conditions, is, in law, an infringement of that right. The opinion of the court, I repeat, rests necessarily upon the ground that the enforced exaction and collection by a municipal corporation of unreasonable compensation for the use of its wharf by a boat, duly enrolled and licensed under the laws of the United States, and engaged in commerce upon the Ohio River, do not infringe or impair any right given or secured either by the Constitution or the existing laws of the United States. To that proposition I am unable to give my assent.

For the reasons stated, I dissent from the opinion and judgment.

LOUISIANA *v.* JUMEL.

ELLIOTT *v.* WILTZ.

1. By force of the act of the legislature of Louisiana, known as Act No. 3 of 1874, and the constitutional amendment adopted in that year, which provided that bonds should be issued under that act in exchange for valid outstanding bonds and warrants at the rate of sixty cents in the new bonds for one dollar of the old bonds and warrants, the State entered into a formal contract, the obligation of which it was forbidden by the Constitution of the United States to impair, and thereby stipulated with each holder of the new bonds so issued that an annual tax of five and one-half mills on the dollar of the assessed value of all the real and personal property in the State should be levied and collected, and the income therefrom applied solely to the payment of the bonds and coupons; that the tax levied by the act and confirmed by the Constitution should be a continuing annual tax until the bonds, principal and interest, were paid in full; that the appropriation of the revenue derived therefrom should be a continuing annual appropriation; and that no further authority than that contained in the act should be required to enable the taxing officers to levy and collect the tax, or the disbursing officers to pay out the money as collected in discharge of the coupons and bonds.
2. After the said act of 1874 was passed, and the constitutional amendment sanctioning it was adopted, sundry parties, citizens of another State, exchanged

their old bonds for new coupon bonds executed pursuant to the requirements of that act, and demanded of the proper State officers payment of the coupons which fell due Jan. 1, 1880, and the application thereto of the funds collected under the levy imposed by the act. Payment was refused solely on the ground that it was forbidden by the third article of the State Debt Ordinance of the new Constitution adopted July 23, 1879, *post*, p. 715; and the treasurer claimed to hold the funds only for the purposes for which they were appropriated by the terms of that Constitution. The parties then brought in the State court of Louisiana a suit for a *mandamus* against the auditor and treasurer of state and the other members of the board of liquidation, requiring them to apply the funds in the treasury derived from the taxes levied or to be levied to the retirement of the bonds, and to execute the said act according to its intent and purpose. They also brought in the Circuit Court against the same defendants a suit praying for an injunction forbidding them to recognize as valid said ordinance, and to oppose the full execution of said act and the constitutional amendment. The suit for *mandamus* was removed to the Circuit Court. *Held*, 1. That the ordinance forbade the payment of the interest due January, 1880, and withdrew from the officers of the State the means of carrying her contract into effect. 2. That the execution of the contract cannot be enforced, nor the relief sought be awarded, in a suit to which she is not a party, but which is brought against officers, who are merely obeying the positive orders of the supreme political power of the State. 3. That at the time the bonds were issued or since no statute or judicial decision authorized a suit against Louisiana in her own courts, nor can she be sued in the courts of the United States by a citizen of another State. 4. That the money in her treasury is her property, held by her officers, not in trust for her creditors nor as their agents, but as her servants, and that the courts cannot control them in the administration of her finances, and thus oust the jurisdiction of the political power of the State.

THE first case is in error to the Circuit Court of the United States for the Eastern District of Louisiana, and the second is an appeal from that court.

The case is stated in the opinion of the court.

Mr. Wheeler H. Peckham and *Mr. George S. Lacey* for the plaintiff in error and the appellant.

Mr. John A. Campbell, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The legislature of Louisiana, at its session of 1874, by an act known as Act No. 3 of 1874, provided for an issue of bonds, to be designated as consolidated bonds of the State, for the purpose of consolidating and reducing the floating and

bonded debt. The bonds were to be payable to the bearer forty years from Jan. 1, 1874, and to bear interest at the rate of seven per cent per annum, payable on the first day of July and the first day of January in each year. The amount was not to exceed in the aggregate fifteen million dollars. The governor, lieutenant-governor, auditor, treasurer, secretary of state, speaker of the House of Representatives, and a person to be elected by these officers as a fiscal agent of the State, were created a board of liquidation, with power to issue the bonds and exchange them for all valid outstanding bonds and certain valid warrants on the treasury, at the rate of sixty cents in the new bonds for one dollar of old bonds and warrants. The bonds were to be signed by the governor, auditor, and secretary of state, and the coupons by the auditor and treasurer.

Section 7 of the act is as follows: —

"That a tax of five and a half mills on the dollar of the assessed value of all real and personal property in the State is hereby annually levied, and shall be collected for the purpose of paying the interest and principal of the consolidated bonds herein authorized, and the revenue derived therefrom is hereby set apart and appropriated to that purpose, and no other. And that it shall be deemed a felony for the fiscal agent or any officer of the State or board of liquidators to divert the said fund from its legitimate channel as provided, and upon conviction the said party shall be liable to imprisonment for not more than ten years nor less than two, at the discretion of the court. If there shall, during any year, be a surplus arising from said tax after paying all interest falling due in that year, such surplus shall be used for the purchase and retirement of bonds authorized by this act, said purchases to be made by the said board of liquidation, from the lowest offers, after due notice: *Provided*, that the total tax for interest and all other State purposes, except the support of public schools, shall never hereafter exceed twelve and a half mills on the dollar. The interest tax aforesaid shall be a continuing annual tax until the said consolidated bonds shall be paid or redeemed, principal and interest; and the said appropriation shall be a continuing annual appropriation during the same period, and this levy and appropriation shall authorize and make it the duty of the auditor and treasurer, and the said board, respectively, to collect said tax annually, and pay said interest and redeem said bonds until the same shall be fully discharged."

By other sections it was provided that any judge, tax-collector, or any other officer of the State obstructing the execution of the act, or any part of it, or failing to perform his official duty, should be deemed guilty of a misdemeanor, and on conviction thereof punished; that each provision of the act should be, and was declared to be, a contract between the State of Louisiana and each and every holder of such consolidated bonds; that the tax-collectors should not pay over any moneys collected by them to any other person than the State treasurer, and that no court, or judge thereof, should have power to enjoin the payment of principal or interest of any of the bonds, or the collection of the special tax therefor.

Immediately after the passage of this act the State adopted an amendment to its Constitution, as follows: —

"The issue of consolidated bonds authorized by the General Assembly of the State, at its regular session in the year 1874, is hereby declared to create a valid contract between the State and each and every holder of said bonds, which the State shall by no means and in no wise impair. The said bonds shall be a valid obligation of the State in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof or the levy and collection of the tax therefor; to secure such levy, collection, and payment, the judicial power shall be exercised when necessary. The tax required for the payment of the principal and interest of said bonds shall be assessed and collected each and every year until the bonds shall be paid, principal and interest, and the proceeds shall be paid by the treasurer of the State to the holders of said bonds, as the principal and interest of the same shall fall due, and no further legislation or appropriation shall be requisite for the said assessment and collection, and for such payment from the treasury."

Under this authority, consolidated bonds to the amount of about twelve million dollars were issued. John Elliott, Nicholas Gwynn, and Henry S. Walker are the holders and bearers of these bonds to the amount of $20,000, and of unpaid coupons due Jan. 1, 1880, to the amount of $78,900. The bonds, in accordance with the requirements of the act under which they were issued, are signed by the governor, auditor,

and secretary of state, and the coupons by the auditor and treasurer.

On the first day of January, 1880, a new Constitution of Louisiana went into effect. A portion of that Constitution, called the "Debt Ordinance," is in these words: —

"STATE DEBT.

"ART. 1. *Be it ordained by the people of the State of Louisiana, in convention assembled*, That the interest to be paid on the consolidated bonds of the State of Louisiana be and is hereby fixed at two per cent per annum for five years from the first day of January, 1880, three per cent per annum for fifteen years, and four per cent per annum thereafter, payable semi-annually; and there shall be levied an annual tax sufficient for the full payment of said interest, not exceeding three mills, the limit of all State tax being hereby fixed at six mills: *Provided*, the holders of consolidated bonds may, at their option, demand in exchange for the bonds held by them, bonds of the denomination of five dollars, one hundred dollars, five hundred dollars, one thousand dollars, to be issued at the rate of seventy-five cents on the dollar of bonds held and to be surrendered by such holders, the said new issue to bear interest at the rate of four per cent per annum, payable semi-annually.

"ART. 2. The holders of consolidated bonds may at any time present their bonds to the treasurer of the State, or to an agent to be appointed by the governor, — one in the city of New York and the other in the city of London, — and the said treasurer or agent, as the case may be, shall indorse or stamp thereon the words, interest reduced to two per cent per annum for five years from January 1, 1880, three per cent per annum for fifteen years, and four per cent per annum thereafter: *Provided*, the holder or holders of said bonds may apply to the treasurer for an exchange of bonds, as provided in the preceding article.

"ART. 3. *Be it further ordained*, That the coupon of said consolidated bonds falling due the first day of January, 1880, be and the same is hereby remitted, and any interest taxes collected to meet said coupon are hereby transferred to defray the expenses of the State government."

Article 209 of the same Constitution provides that "the State tax on all property for all purposes whatever, including expenses of government, schools, levees, and interest, shall not exceed in any one year six mills on the dollar of its assessed valuation."

Elliott, Gwynn, and Walker demanded of the proper State officers payment of their coupons which fell due Jan. 1, 1880; but such payment was refused, the auditor and treasurer stating "that they could not comply with the request made of them, owing to the prohibition contained in art. 8, State debt ordinance of the Constitution of the State of Louisiana, adopted 23d July, 1879, and recently promulgated."

All the taxes allowed by the new Constitution have been levied for the year 1880, but no proceedings have been taken to levy and collect the five and a half mill tax under the act of 1874. About $300,000 is in the treasury of the State, collected under the levy imposed by the act of 1874 to meet the coupons falling due January, 1880; but the treasurer refuses to apply it to the payment of the coupons, and claims to hold it only for the purposes to which it was to be appropriated by the terms of the new Constitution. There are also taxes levied for former years under the act of 1874, which remain uncollected, and are subject to future collection and payment into the treasury under the operation of the collection laws.

In this condition of things, said Elliott, Gwynn, and Walker, on the 16th of January, 1880, commenced a suit in equity in the Circuit Court of the United States for the Eastern District of Louisiana, against the several officers of the State composing the board of liquidation. The prayer of the bill is that it may be "ordered, adjudged, and decreed" that the act No. 3, of 1874, "so far as your orator's interests herein above declared are concerned, was all the time from its passage, has been, and, at the time of the rendition of the decree herein prayed for, is a valid and subsisting law of the State of Louisiana; that the act aforesaid, the constitutional amendment of 1874, and the several bonds and coupons of interest, held and owned by your orators as aforesaid, separately and together, constituted, were, and are, good, valid, subsisting, and binding contracts between the State aforesaid and the bearers and holders of the consolidated bonds and coupons, the obligation of which contract cannot be lawfully or constitutionally impaired; and that, under and by virtue of such contract, your orators were and are entitled to take and enjoy all the rights, privileges, taxes, and moneys, particularly set forth and mentioned in act No. 3, and

the constitutional amendment of 1874, aforesaid; that so much of the aforesaid Constitution of 1879 as alters, varies, modifies, or changes, or assumes, purports, or attempts to alter, vary, modify, or change, the provisions of the said act of 1874, and the constitutional amendment of that year, especially article 208 of the Constitution of the year 1879, and that portion of such Constitution known and distinguished as the ordinance on 'State debt,' do impair the obligation of the contract herein above referred to; that the said parts and portions of such Constitution are, therefore, violative of the Constitution of the United States, and are absolutely null and void, and without the slightest force or effect whatever against complainants; and afford and offer no authority or warrant for the defendants, or any one or more of them, to make such disposition or application of any part or portion of the aforesaid taxes, and the proceeds thereof, collected and to be collected, as to enable the State, therewith, to defray the expenses of the State government, or to accomplish any purpose or purposes other than those prescribed in the aforesaid funding act, and constitutional amendment of 1874; that the defendants, and each of them, may be adjudged and decreed to replace and reinstate to the credit of said interest fund any moneys or funds that may have been diverted therefrom; . . . and that said defendants, and each and every one of them, may be peremptorily enjoined and restrained from recognizing as valid, against your orators, art. 208 of the Constitution of Louisiana," and the "Debt Ordinance," and "from ignoring the Funding Act and constitutional amendment of 1874, and from doing, and causing to be done, any act or thing whatsoever obstructing, preventing, or impeding, or tending, directly or indirectly, to obstruct, prevent, or impede, in the slightest degree, the prompt, full, and complete execution and enforcement of the act and constitutional amendment aforesaid; and, finally, that the said defendants, and each and every one of them, may be enjoined and restrained to such other and further extent, and in such additional way and manner, as the court may deem right and proper."

On the 26th of January, 1880, the same parties as relators filed a petition in a State court of Louisiana against the auditor and treasurer of state and the several members of the

board of liquidation, being Louis A. Wiltz, the governor, Samuel McEnery, lieutenant-governor, Allen Jumel, auditor, Edward A. Burke, treasurer, William A. Strong, secretary of state, Robert N. Ogden, speaker of the House of Representatives, and the State National Bank of New Orleans, fiscal agent, for a *mandamus* requiring them "to apply and pay to the extinguishment of the interest now due and payable upon the consolidated bonds of the State of Louisiana, or becoming due and payable upon said bonds, and to the redemption and retirement of such consolidated bonds, as are provided for and required by the aforesaid act No. 3 of the year 1874, any and all moneys and proceeds of the tax levied or fixed by said act now in the hands or subject to the control of the said defendants or either one of them, or which have been in the hands or subject to the control of the said defendants or either one of them, or which may come into their hands or become subject to the control of either of them, not already applied to the payment of interest upon the aforesaid bonds, or to the redemption and retirement of the bonds themselves, as provided for and required in and by said act No. 3;" and that they "may furthermore be commanded and required to proceed, without delay, to collect the tax fixed or levied in and by the aforesaid act No. 3 of the year 1874, in the manner and to the extent contemplated by that statute, and to apply and pay all moneys realized from such tax to the discharge of the interest and redemption of the bonds issued under and by virtue of the aforesaid Funding Act No. 3 . . . until the principal and interest of such bonds be fully extinguished and discharged; and, finally, that the said defendants may severally be commanded and required to enforce the act herein above last referred to, and particularly to carry out, perform, and discharge each and every one and all the ministerial acts, things, and duties respectively required of them by the aforesaid act No. 3, according to the full and true intent and purport of that act."

This suit was afterwards removed into the Circuit Court of the United States for the Eastern District of Louisiana.

Upon final hearing the Circuit Court denied the relief prayed for in each of the suits, because, as stated in the conclusions of law which were filed in connection with the findings of fact, it

appeared that the respondents were constitutional officers of the State, and had no relation to the funds collected, or to be collected, except as such officers; that they were clothed with no authority and charged with no duty to pay over or collect said funds to or in behalf of the relators and complainants, but, on the contrary, by the organic law of the State under which their offices were created and exist, the provisions of which constitute their sole mandate, are prohibited from so doing. For these reasons it was concluded that the State was the party which, by its action in its original capacity through the people, had rendered the execution of its contract with the relators impossible through the instrumentality of its officers or functionaries, and that the question presented was political rather than judicial, and could not be adjudicated without calling the State to the bar of the court and subverting its entire financial basis, no matter how unjustly adopted and ordained.

From a judgment and a decree to that effect a writ of error was brought and an appeal taken.

The two suits may properly be considered together here, as they were below, because they present substantially the same questions.

We have no doubt it was the intention of the State of Louisiana to enter into a formal contract with each and every holder of bonds so issued under the act of 1874, to levy and collect an annual tax of five and one-half mills on the dollar of the assessed value of all the real and personal property in the State, and to apply the revenue derived therefrom to the payment of the principal and interest of the bonds, and to no other purpose. By the obligation so entered into it was also agreed, that the tax levied by the act and confirmed by the Constitution should be a continuing annual tax until the bonds, principal and interest, were paid in full; that the appropriation of the revenue derived therefrom should be a continuing annual appropriation, and that no further authority than that contained in the act should be required to enable the taxing officers to levy and collect the tax, or the disbursing officers to pay out the money as collected in discharge of the obligation of the bonds. Whatever may be ordinarily the effect of a promise or a pledge of faith by a State, the language employed in this instance shows

unmistakably a design to make these promises and these pledges so far contracts that their obligation would be protected by the Constitution of the United States against impairment.

It is equally manifest that the object of the State in adopting the "Debt Ordinance" in 1879 was to stop the further levy of the promised tax, and to prevent the disbursing officers from using the revenue from previous levies to pay the interest falling due in January, 1880, as well as the principal and interest maturing thereafter.

The bonds and coupons which the parties to these suits hold have not been reduced to judgment, and there is no way in which the State, in its capacity as an organized political community, can be brought before any court of the State, or of the United States, to answer a suit in the name of these holders to obtain such a judgment. It was expressly decided by the Supreme Court of the State in *State, ex rel. Hart*, v. *Burke*, 33 La. Ann. 498, that such a suit could not be brought in the State courts, and under the Eleventh Amendment of the Constitution no State can be sued in the courts of the United States by a citizen of another State. Neither was there when the bonds were issued, nor is there now, any statute or judicial decision giving the bondholders a remedy in the State courts or elsewhere, either by *mandamus* or injunction, against the State in its political capacity, to compel it to do what it has agreed should be done, but which it refuses to do.

These, then, are suits by creditors at large, of the class provided for in the act of 1874, to compel, by judicial process, the officers of the State to enforce the provisions of the act, when the State, by an amendment to its Constitution, has undertaken to prohibit them from doing so, and when the court, if it requires an officer to proceed, cannot protect him with a judgment to which the State is a party. The persons sued are the executive officers of the State, and they are proceeded against in their official capacity. The money in the treasury is the property of the State, and not in any legal sense the property of the bond or coupon holders. If it be lost or destroyed, the loss will fall alone on the State or its agents, and the bondholders will be entitled to payment in full from other sources. True, the money was raised to pay this particular class of debts,

and the agreement was that it should not be used for any other purpose; but, notwithstanding this, the State has undertaken to appropriate it to defray the expenses of the government. In this way the State has violated its contract, and, if it could be sued, might perhaps be made to set aside its wrongful appropriation of the money already in hand, and raise more by taxation, if necessary.

That the Constitution of 1879 on its face takes away the power of the executive officers to comply with the terms of the act of 1874 cannot be denied. As against everything but the outstanding bonds and coupons, this Constitution is the fundamental law of the State, and it is only invalid so far as it impairs the obligation of the contract on the faith of which the bonds and coupons were taken by their respective holders. The question, then, is whether the contract can be enforced, notwithstanding the Constitution, by coercing the agents and officers of the State, whose authority has been withdrawn in violation of the contract, without the State itself in its political capacity being a party to the proceedings.

The relief asked will require the officers against whom the process is issued to act contrary to the positive orders of the supreme political power of the State, whose creatures they are, and to which they are ultimately responsible in law for what they do. They must use the public money in the treasury and under their official control in one way, when the supreme power has directed them to use it in another, and they must raise more money by taxation when the same power has declared that it shall not be done.

The parties prosecuting the suits do not, in direct terms, ask for the payment of the bonds and coupons they hold. In fact, this seems to have been purposely avoided, for in the suit for *mandamus* the petition was amended before the hearing by striking out all that would have the effect of confining the command of the writ to such a payment, and left the prayer for an order requiring the use of the money raised under the act of 1874 for the redemption and retirement generally of all the bonds and coupons of the issue. In the suit in equity, while it was asked that the "Debt Ordinance" of 1879 might be declared invalid as against the complainants, payment of the

amount due was only sought through the general administration of the finances in accordance with the provisions of the act of 1874. In neither of the suits was any inquiry to be instituted in respect to the particular bonds and coupons held by the plaintiffs, or any special relief afforded as to them. All that is asked will inure as much to the benefit of the other holders of similar obligations as to the particular parties to these suits. So that the remedy sought implies power in the judiciary to compel the State to abide by and perform its contracts for the payment of money, not by rendering and enforcing a judgment in the ordinary form of judicial procedure, but by assuming the control of the administration of the fiscal affairs of the State to the extent that may be necessary to accomplish the end in view.

It is insisted, however, that the money in the treasury collected from the tax levied for the year 1879 constitutes a trust fund of which the individual defendants are *ex officio* trustees, and that they may be enjoined as such trustees from diverting it from the purposes to which it was pledged under the contract. The individual defendants are the several officers of the State, who, under the law, compose the board of liquidation. That board is, in no sense, a custodian of this fund. Its duty was to negotiate the exchange of the new bonds for the old on the terms proposed. It had nothing to do with levying the tax, collecting the money, or paying it out further than by purchasing the bonds with any surplus there might be from time to time in the treasury over what was required to meet the interest. The provision in the law that it shall be the duty of the auditor, treasurer, and the board, respectively, to collect the tax, pay the interest, and redeem the bonds evidently means no more than that the auditor and treasurer shall perform their respective duties under the general laws in the assessment and collection of the tax, and shall pay in the usual manner the interest and principal of the bonds as they respectively fall due, and that the board shall purchase and retire the bonds whenever there is a surplus, which, under the law, is to be used for that purpose.

The treasurer of state is the keeper of the treasury, and in that way is the keeper of the money collected from this tax, just as he is the keeper of other public moneys. The taxes

were collected by the tax-collectors and paid over to him, that is to say, into the State treasury, just as other taxes were when collected. He is no more a trustee of these moneys than he is of all other public moneys. He holds them, but only as the agent of the State. If there is any trust, the State is the trustee, and unless the State can be sued the trustee cannot be enjoined. The officers owe duty to the State alone, and have no contract relations with the bondholders. They can only act as the State directs them to act, and hold as the State allows them to hold. It was never agreed that their relations with the bondholders should be any other than as officers of the State, or that they should have any control over this fund except to keep it like other funds in the treasury and pay it out according to law. They can be moved through the State, but not the State through them.

In this connection there is much that is instructive in *Reg.* v. *Lords Commissioners of the Treasury*, Law Rep. 7 Q. B. 387. There money had been appropriated by Parliament for the payment of costs of a particular character, and an application was made for a *mandamus* to compel the Lords Commissioners of the Treasury to pay certain bills which had been properly taxed; but although the court was emphatic in its declaration that payment ought to be made, the writ was refused because the Lords Commissioners held "the money as the servants of the Crown, and no duty was imposed upon them as between them and the persons to whom the money was payable." Lord Chief Justice Cockburn, in his opinion, said (p. 394): "Though I quite agree that according to the appropriation act they (the Lords Commissioners) were bound to apply the money upon the vouchers being produced, and had no authority to retax these bills, still I cannot say that there is any duty which makes it incumbent upon them to do what I cannot hesitate to say they ought to have done, except as servants of the Crown; because in that character they have received the money, and in no other." And Blackburn, J. (p. 399): "It seems to me that the obligation, such as it is, is upon her Majesty, to be discharged through her servants, and you cannot proceed therefor against the servants." So, here, the obligation is all on the State, to be discharged through its

servants, and the money is held by the officers proceeded against in their character as servants of the State, and no other.

There is nothing in any of the cases in this court that are relied on which, to our minds, authorizes any such relief as is asked. In *Osborn* v. *Bank of the United States*, 9 Wheat. 738, which is the leading case, and cited as authority in all the others, the object was to prevent money which had been unlawfully taken out of the bank by the officers of the State from getting into the treasury. The money was, in legal effect, stopped while passing from the bank to the treasury. The controlling facts are thus stated by Chief Justice Marshall in the opinion (p. 868): "But when we reflect that the defendants, Osborn and Harper, are incontestably liable for the full amount of the money taken out of the bank; that the defendant, Currie, is also responsible for the sum received by him, it having come to his hands with full knowledge of the unlawful means by which it was acquired; that the defendant, Sullivan, is also responsible for the sum specifically delivered to him, with notice that it was the property of the bank, unless the form of having made an entry on the books of the treasury can countervail the fact, that it was, in truth, kept untouched, in a trunk, by itself, as a deposit, to await the event of the pending suit respecting it; we may lay it down as a proposition, safely to be affirmed, that all the defendants in the cause were liable in an action at law for the amount of this decree. If the original injunction was properly awarded, for the reasons stated in the preceding part of this opinion, the money, having reached the hands of all those to whom it afterwards came with notice of that injunction, might be pursued, so long as it remained a distinct deposit, neither mixed with the money of the treasury, nor put into circulation. . . . The money of the bank had been taken, without authority, by some of the defendants, and was detained by the only person who was not an original wrongdoer, in a specific form; so that detinue might have been maintained for it, had it been in the power of the bank to prove the facts which are necessary to establish the identity of the property sued for." Under this state of facts the order for its return involved no question of power to interfere with what was actually in the treasury. The officers stood in the place

of a sheriff who had levied an execution on goods and was sued to test his right to keep them, and the principle applied in the decision is thus stated in the head-note of the report: "A court of equity will interpose by injunction to prevent the transfer of a specific thing which, if transferred, will be irretrievably lost to the owner, such as negotiable stocks and securities." Thus the money seized was kept out of the treasury, because if it got in it would be irretrievably lost to the bank, since the State could not be sued to recover it back. No one pretended that if the money had been actually paid into the treasury, and had become mixed with the other money there, it could have been got back from the State by a suit against the officers. They would have been individually liable for the unlawful seizure and conversion, but the recovery would be against them individually for the wrongs they had personally done, and could have no effect on the money which was held by the State. Certainly no one would ever suppose that by a proceeding against the officers alone, they could be held as trustees for the bank, and required to set apart from the moneys in the treasury an amount equal to that which had been improperly put there, and hold it for the discharge of the liability which the State incurred by reason of the unlawful exaction.

In *Davis* v. *Gray*, 16 Wall. 203, the receiver of a land-grant railroad obtained an injunction against the Governor and the Commissioner of the General Land-Office of Texas to restrain them from incumbering, by patents to others, lands which had been contracted to the railroad company. The legal title was in the State, but the equitable title in the company. The specific tracts in dispute were, by the contract which had been made, segregated from the public domain and set apart for the company. The case rests on the same principle it would if patents had been actually issued to the company, and the State, through its officers, was attempting to place a cloud on the title by granting subsequent patents to others.

Board of Liquidation v. *McComb*, 92 U. S. 531, arose under the same act of 1874 that we are now considering. The board was there enjoined, at the instance of bondholders, from admitting to the privileges of the compromise proposed by the State certain persons other than those originally provided for and on

different terms. And this clearly because the board was, by the very terms of the law, charged with the duty of exchanging the bonds specifically set apart by the contract for a particular purpose, and every *bona fide* bondholder, by accepting the compromise offered, became personally interested in securing the due administration of the trust which had thus been committed to the board. In fact the board held the new issue of bonds in trust, and every one who gave up his old obligations and accepted the new in settlement became a beneficiary under the trust, and might act accordingly.

In this case, however, there is no such trust. As has already been said, the board is charged with no duty in respect to the taxes, except in connection with the purchase of bonds whenever there are funds which can be used in that way. The auditor and treasurer are required to audit and pay the coupons as they are presented; but that does not make them trustees for the bondholders of the money in the treasury out of which the payment is to be made. They may draw on the fund raised to make the payment, but that is the extent of their official control over it. The law has never made it a part of their official duty to separate from the other moneys in the treasury that realized from the taxes in question, and to hold it in trust for the bondholders. The State has contracted not to use this money in any other way than to pay the debt; but, as against the State, the officers have no right to say they will keep it for that purpose only. It may be, without doubt, easily ascertained from the accounts how much of the money on hand is applicable to the payment of this class of debts; but the law nowhere requires the setting apart of this fund any more than others from the common stock. In the treasury all funds are mingled together, and kept so until called for to meet specific demands.

In *United States* v. *Lee*, 106 U. S. 196, it was held that the officers of the United States, holding in their official capacity the possession of lands to which the United States had no title, could be required to surrender their possession to the rightful owner even though the United States were not a party to the judgment under which the eviction was to be had. Here, however, the money in question is lawfully the property of the

State. It is in the manual possession of an officer of the State. The bondholders never owned it. The most they can claim is that the State ought to use it to pay their coupons, but until so used it is in no sense theirs.

Little need be said with special reference to the suit for *mandamus*. In this no trust is involved; but the simple question presented is, whether a single bondholder, or a committee of bondholders, can, by the judicial writ of *mandamus*, compel the executive officers of the State to perform generally their several duties under the law. The relators do not occupy the position of creditors of the State demanding payment from an executive officer charged with the ministerial duty of taking the money from the public treasury and handing it over to them, and, on his refusal, seeking to compel him to perform that specific duty. What they ask is that the auditor of state, the treasurer of state, and the board of liquidation may be required to enforce the act of 1874, and "carry out, perform, and discharge each and every one of the ministerial acts, things, and duties respectively required of them, . . . according to the full and true intent and purport of that act." Certainly no suit begun in the Circuit Court for such relief would be entertained, for that court can ordinarily grant a writ of *mandamus* only in aid of some existing jurisdiction. *Bath County* v. *Amy*, 13 Wall. 244; *Davenport* v. *County of Dodge*, 105 U. S. 237. Our attention has been called to no case in the courts of Louisiana in which such general relief has been afforded; and the jurisdiction of the Circuit Court was, therefore, in no way enlarged through the operation of the removal acts, even if this is a case which was properly removed, — a question we do not deem it necessary now to decide. The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot be thus

ousted of its jurisdiction and the judiciary set in its place. When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power.

Judgment affirmed.
Decree affirmed.

MR. JUSTICE FIELD and MR. JUSTICE HARLAN dissented.

MR. JUSTICE FIELD. I am not able to concur in the judgment in these cases, and I will briefly state my reasons.

I admit that the rule of the common law that the sovereign cannot be held amenable to process in his own courts without his consent, is applied in this country to the State, under which designation are included the people within its territorial limits, in whom resides whatever sovereignty the State possesses. But they act and speak in this country, at least in times of peace, only through the Constitution and laws. For their will we must look to these manifestations of it. If in that way they consent to suits, either directly against themselves by name or against any of their authorized agents, there can be no reasons of policy or of law against issuing process in proper cases to bring them or their agents before the court. And if in that way, that is, by their Constitution or laws, they direct their officers to do or omit certain things, in the doing or omission of which individuals are interested, and they provide appropriate remedies to compel or enjoin the performance of those things, there can be no reason why such remedies should not be resorted to when private rights are involved.

And such is the case with respect to the subjects of the

present suits. The State of Louisiana entered into certain engagements with her creditors; she embodied them in the most solemn form in a statute and in her organic law; she provided for the levying of a tax to pay those creditors; she prescribed certain duties for designated officers to perform in its collection and disbursement; she made it a felony for those officers to divert the fund thus raised to other purposes, she declared that no further legislation should be necessary for the collection of the tax or the appropriation of the proceeds, and that for the collection and payment of the tax the judicial power of the State should be exercised when necessary. The plaintiffs in these suits seek the enforcement of these engagements; and they are resisted merely because the engagements are repudiated by the State; and this court holds that it has no power to stay the repudiation.

That the character and object of these suits may more clearly appear, I will briefly give the history of the action of the State. Prior to 1874 Louisiana had contracted an indebtedness amounting to about eighteen millions of dollars. She asserted that a large portion of it had been fraudulently contracted; while the holders contended that their claims were valid and that she was legally and equitably bound therefor. Under these circumstances, and with a view to determine the conflicting claims of the parties, and to liquidate and settle her indebtedness, she proposed to issue new bonds for sixty per cent of the alleged indebtedness, upon the surrender of the claims; and, to induce the surrender, offered to make various enactments to secure the principal and interest of the new bonds. In 1874 she passed an act, known as act No. 3 of the laws of that year, entitled "An Act to provide for funding obligations of the State by exchange for bonds; to provide for principal and interest of said bonds; to establish a board of liquidation; to authorize certain judicial proceedings against it; to define and punish violations of this act; to prohibit certain officers diverting funds, except as provided by law, and to punish violations therefor; to levy a continuing tax and provide a continuing appropriation for said bonds; to make a contract between the State and holders of said bonds; to prohibit injunctions in certain cases; to limit the indebtedness of the

State and to limit State taxes; to annul certain grants of State aid; to prohibit the modification, novation, or extension of any contract heretofore made for State aid; to provide for the receipt of certain warrants for certain taxes; and to repeal all conflicting laws."

By this act the governor, lieutenant-governor, auditor, treasurer, secretary of state, and speaker of the House of Representatives, and a seventh person to be selected by them, called a fiscal agent, were constituted a board of liquidation, and were authorized to issue bonds of the State, to be called consolidation bonds, payable in forty years, with interest at seven per cent, and to exchange them for valid outstanding bonds and auditor's warrants at the rate of sixty cents on the dollar. The interest was to be payable semi-annually, on the first of January and July of each year; and for it coupons were to be annexed to the bonds.

The act levied an annual tax of five and a half mills on the dollar of the assessed value of all real and personal property in the State, and declared that it should be collected for the purpose of paying the principal and interest of the consolidated bonds, and that the revenue derived therefrom was thereby "set apart and appropriated for that purpose, and no other," and that it should be a felony for the fiscal agent or any officer of the State or of the board of liquidation to divert the fund from its legitimate channel. It also declared that this tax, which is called an interest tax, "shall be a continuing annual tax until the said consolidated bonds shall be paid or redeemed, principal and interest; and the said appropriation shall be a continuing annual appropriation during the same period, and this levy and appropriation shall authorize and make it the duty of the auditor and treasurer, and the said board respectively, to collect said tax annually, and pay said interest and redeem the said bonds until the same shall be fully discharged."

One section also provided "that any judge, tax-collector, or any officer of the State obstructing the execution of this act, or any part of it, or failing to perform his official duty thereunder, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment not exceeding five years and by fine not exceeding two thousand dollars, at the discretion of the court."

Another section enacted that each provision of the act should be, and it was declared to be, "a contract between the State of Louisiana and each and every holder of the bonds" issued under the act.

But, as though this act was not of itself a sufficient assurance of the unalterable purpose of the State to fulfil the promise it contained, an amendment to her Constitution was proposed and adopted, of which the following is the first section: —

"The issue of consolidated bonds, authorized by the General Assembly of the State, at its regular session in the year 1874, is hereby declared to create a valid contract between the State and each and every holder of said bonds, which the State shall by no means and in no wise impair. The said bonds shall be a valid obligation of the State in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof, or the levy and collection of the tax therefor; to secure such levy, collection, and payment, the judicial power shall be exercised when necessary. The tax required for the payment of the principal and interest of said bonds shall be assessed and collected each and every year, until the bonds shall be paid, principal and interest, and the proceeds shall be paid by the treasurer of the State to the holders of said bonds, as the principal and interest of the same shall fall due, and no further legislation or appropriation shall be requisite for the said assessment and collection, and for such payment from the treasury."

It would puzzle the wit of man to find anywhere in the legislation of the world a more perfect assurance of the fixed purpose of a State to keep faith with her creditors, or of a pledge of a portion of her revenues for their payment, or of the submission of her officers to the compulsory process of the judicial tribunals, if necessary, to carry out her engagements. With the knowledge that the Federal Constitution ordains "that no State shall pass any law impairing the obligation of contracts," Louisiana proclaims that each provision of the act shall be and is thereby declared to be a contract between her and each and every holder of the bonds issued under the act. And the constitutional amendment reiterates substantially the same thing by declaring that the issue of the consolidated bonds

created a valid contract between the State and each and every holder of said bonds, "which the State shall by no means and in no wise impair."

Under this act and the constitutional amendment, obligations of the State amounting to over $12,000,000 were surrendered, and bonds taken for sixty per cent of their amount, which are held all over the country. The complainants in the injunction suit, and the petitioners for the *mandamus*, hold for themselves and others, whom they represent, $900,000 of the bonds. The interest on them has not been paid, and yet a portion of the tax levied to meet such interest has been collected, and is now in the hands of the treasurer of the State, one of the board of liquidation. The amount is admitted to be about $300,000, and as collections were making when this admission was given, there is now probably a much larger amount in his hands. In both suits it is alleged that the treasurer and other officers of the State intend to use the funds thus collected for other purposes than the payment of the interest. In one of them an injunction is asked against such a perversion of the funds. In the other a *mandamus* is asked to compel the application of the funds to the payment of the interest, and also the collection of the taxes authorized by the act of 1874, and the constitutional amendment of that year, to meet further interest as it shall become due.

Why should not both these prayers be granted?

The only answer offered is, that in 1879 Louisiana adopted a new Constitution, which reduced the interest on the consolidated bonds to two per cent per annum for five years, to three per cent for fifteen years afterwards, and to four per cent thereafter, with a proviso that the holders of the bonds might take new bonds for seventy-five per cent on the dollar, drawing four per cent interest.

The new Constitution also directed that the coupon of the consolidated bonds falling due Jan. 1, 1880, should be remitted, and that the interest taxes collected for its payment should be transferred to defray the expenses of the State government. The change in the rate of interest and the remission of the coupon falling due Jan. 1, 1880, were made

without the consent of the bondholders, or any consultation with them. Of course the new Constitution, in these provisions, is a repudiation of the engagements of the act of 1874 and of the constitutional amendment of that year, and is a direct violation of the inhibition of the Federal Constitution against the impairment of the obligation of contracts.

Is this inhibition against the repudiation by the State of her engagements of any efficacy? The majority of the court answer No. I answer, adhering to the doctrines taught by a long line of illustrious judges preceding me, "Yes, it is;" and though now denied, I feel confident that at no distant day its power will be reasserted and maintained. In that faith I dissent from the judgment of my associates, and I shall continue to do so on all proper occasions, until the prohibition inserted in the Constitution as a barrier against the agrarian and despoiling spirit, which both precedes and follows a breach of public faith, is restored to its original vigor.

The question whether the court will restrain the diversion of the funds in the hands of the treasurer, a member of the board of liquidation, is to be considered precisely as though the new Constitution had never been adopted. The inhibition of the Federal Constitution is upon the State and not merely upon her legislature. All the authority which her people can confer, whether by constitutional enactment or legislative provision, is subject to the inhibition. Her people are at all times under the Constitution of the United States, subject to its restrictions as they are entitled to its privileges. They cannot lawfully insert in any constitution or organic law provisions contravening that instrument. They cannot authorize their legislature to pass a bill of attainder, or an *ex post facto* law, or a law impairing the obligation of contracts, nor can they embody in their Constitution clauses amounting to or operating as such enactments. Any such authority or clauses would be treated as nugatory and futile by all tribunals holding that the Constitution of the United States is, what on its face it is declared to be, the supreme law of the land. Therefore, the new Constitution of Louisiana stands before us, with respect to her past contracts, with no greater weight than would a legislative enactment containing similar provisions; and what the State

authorizes to be done by her judicial tribunals against her officers, in the collection of the tax and the application of the moneys raised for the payment of the interest on the bonds, can be done by the judicial tribunals of the Federal government when a case is transferred to them from a State court.

If the new Constitution had never been adopted, there could be no question as to the power of the State courts to require that the moneys collected be applied to the payment of the interest. It would not only have been the duty of the board of liquidation to thus apply them, but it would have been a felony to refuse to do so. Now, whatever enactment, constitutional or legislative, impairs the obligation of the contract with the bondholders, that is, abrogates or lessens the means of its enforcement, is void. Therefore, the new Constitution, as to that contract, is to be treated as though it never existed. As said by this court, without a dissenting voice, only two years ago, in *Wolff* v. *New Orleans:* "Legislation producing this latter result (impairment of the obligation of a contract by abrogating or lessening the means of its enforcement), not indirectly as a consequence of legitimate measures taken, as will sometimes happen, but directly by operating upon those means, is prohibited by the Constitution, and must be disregarded, treated as though never enacted, by all courts recognizing the Constitution as the paramount law of the land." 103 U. S. 358, 365.

And again, in the same case: "The prohibition of the Constitution against the passage of laws impairing the obligation of contracts applies to the contracts of the State, and to those of its agents acting under its authority, as well as to contracts between individuals. And that obligation is impaired, in the sense of the Constitution, when the means by which a contract at the time of its execution could be enforced, that is, by which the parties could be *obliged* to perform it, are rendered less efficacious by legislation operating directly upon those means." Id. 367.

No reason in law, therefore, any more than in morals, can be given why the mandates of the act of 1874 and the constitutional amendment of that year should not be carried out. There is nothing in the fact that the defendants are officers of

the State. The books are full of cases where executive and administrative officers of a State have been required by the judiciary to do certain acts, or been enjoined from doing them. And it has not been deemed an answer to the proceeding that the State was interested in the controversy.

In *Osborn* v. *Bank of the United States*, decided in 1824, an injunction was sustained against the treasurer and auditor of Ohio to prevent the seizure of moneys belonging to the bank in payment of taxes levied under an unconstitutional law of the State. It was urged with much zeal that the State of Ohio, though not nominally a defendant, was the real party in interest, and that the suit was in fact against the State, which it was conceded could not be sued directly. But the court said, Chief Justice Marshall delivering the opinion: "If the State of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties, but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best-established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit." 9 Wheat. 738, 842.

These views, as was said in the opinion in *United States* v. *Lee*, 106 U. S. 196, have never been overruled; and the case itself is cited with approval in *Davis* v. *Gray*, decided in 1872, as establishing, among other propositions, that "Where the State is concerned, the State should be made a party, if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record. In deciding who are parties to the suit,

the court will not look beyond the record. Making a State officer a party does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest." 16 Wall. 203, 220.

In *Davis* v. *Gray*, the Governor and the Commissioner of the General Land-Office of Texas were "enjoined from issuing or causing or permitting to issue" patents of certain lands, the sale of which her Constitution had authorized, upon the supposition that the title of a corporation to them had been lost. In considering the right of a private party to maintain suit against those officers, inasmuch as a suit could not be brought directly against the State, the court reasserted the doctrine announced in *Osborn* v. *Bank of the United States*.

The objection suggested was also considered and disposed of in *Board of Liquidation* v. *McComb*, a case against these very officers, decided in 1875. There the board undertook to liquidate a debt contracted in reconstructing and keeping in repair levees on the Mississippi River, with consolidated bonds issued under the act of 1874, pursuant to the authority of a subsequent statute of the legislature. A citizen of Delaware holding some of the consolidated bonds contended that the levee debt was not one of the debts to fund which these bonds had been issued, and that the use of them for that purpose would defeat one of the benefits of the funding scheme. He therefore applied to the Circuit Court of the United States for an injunction to restrain the board from funding the levee debt with those bonds, and obtained it. The injunction was made perpetual by a final decree, which was affirmed here. "In our judgment, therefore," we said, speaking by Mr. Justice Bradley, "the court below was right in granting the injunction as to the consolidated bonds, if the defendants, occupying the official position they do, are amenable to such a process. On this branch of the subject, the numerous and well-considered cases heretofore decided by this court leave little to be said. The objections to proceeding against State officers by *mandamus* or injunction are, first, that it is in effect proceeding against the State itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A State, without its

consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of *mandamus* and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void." 92 U. S. 531, 541.

Nor is there any force in the objection that the funds which the complainants and petitioners seek to reach are in the treasury of the State. They are appropriated by the law of 1874, and by the constitutional amendment of that year, to the payment of the interest on the consolidated bonds. The statute declares that the revenue derived from the taxes levied to pay the interest and principal of the bonds is "set apart and appropriated to that purpose, and no other;" that "the said appropriation shall be a continuing annual appropriation" until the bonds are paid or redeemed, principal and interest; and that "it shall be deemed a felony for the fiscal agent, or any officer of the State or board of liquidation to divert the fund" from this channel. The constitutional amendment declares that no further legislation than that specified therein shall be requisite for the appropriation of the proceeds of the taxes levied.

Nothing more could be expressed to render the appropriation of the fund for the interest and principal of the bonds absolutely complete. The fund could not afterwards be diverted to any other purpose. The ministerial duty alone remained with the officer of the State having charge of the fund, wherever it might be, to apply it.

There would seem to be an impression that to constitute a valid appropriation there must be some segregation of the amount appropriated from the general mass of money in the treasury, by which it is placed in packages, bags, or boxes, separate from the rest and set aside. But nothing of the kind is done, nor is it required to take the amount appropriated from the control of the fiscal officers of the State for other purposes. The appropriation is the legalization of the use of a designated amount in the treasury for a specific object, and an inhibition of its use in any other way. That is all. Henceforth to meet the appropriation the fiscal officers must retain the designated amount in the treasury, but not necessarily separated in packages, bags, or boxes from other funds. Their duty is purely ministerial, — to hold it and pay it when called for. Were this not so, there could be no appropriations of moneys before their collection, which it is the constant practice of legislative bodies to make in view of anticipated revenue. When the moneys are collected and passed into the treasury, the appropriation is complete. They are, in the eye of the law, dedicated to a specific purpose, and the party in whose behalf the appropriation is made can compel its payment by *mandamus*, as in the case of appropriations for the salaries of judges, heads of departments, and others. That writ is the common and appropriate remedy to enforce such payment.

Nor is there any weight in the objection that the officers of the State are called upon to enforce the collection of the tax. They are simply called upon to obey the mandates of the law and Constitution of the State. Both levy the tax, and designate its amount and the officers to collect it. The statute declares that the tax shall be a "continuing annual tax" until the bonds are paid or redeemed. The constitutional amendment declares that "the tax required for the payment of the principal and interest of said bonds shall be assessed and collected each and every year until the bonds shall be paid, principal and interest, and the proceeds shall be paid by the treasurer of the State to the holders of said bonds, as the principal and interest of the same shall fall due, and no further legislation or appropriation shall be requisite for the

said assessment and collection, and for such payment from the treasury."

Here are provisions for levying, collecting, and appropriating, sufficient for these purposes, or language is incapable of expressing them. Whatever doubts might be entertained as to the authority of the legislature to make a levy and an appropriation to take effect in subsequent years, to meet the interest then accruing, they are removed by the constitutional amendment. There is nothing in the reason of the thing why the levy of taxes and the appropriations for all purposes should be made annually. They may be made for years in advance, if the Constitution of the State so permits, in order to provide for a sinking fund or to meet an expenditure for a work which may take years for its completion, or to meet, as in this case, future interest on its indebtedness. In some of the States the sessions of the legislature are biennial. The interval between the sessions might be increased, and there would be quite as much objection, so far as power is concerned, to the levy of taxes, and to the appropriations for those periods as for one year.

The tax provided and the appropriation of its proceeds were made for many years by the amendment to the Constitution, which expressed at the time the will of the people of the State. Nothing is to be done by the court and nothing is asked of it but to require that this will be obeyed.

There is another reason suggested against the maintenance of the suits, not, as appears to me, very potential, but which affects the judgment of some able men, — that the obligations of States are purely honorary, and cannot, therefore, be the subject of judicial cognizance. What is meant by honorary, so far as I can understand it, is that the obligations may or may not be fulfilled as the States will; in other words, that they are matters of convenience and not of duty, to be performed if the caprice of the hour approve, to be disregarded if the caprice of a subsequent hour disapprove. Or, to use other terms of explanation, as there is no mode of compelling a State, by suit directly against her, to observe her obligations, they must be deemed honorary; that is, just so far as they may be dishonored without redress to those who trusted

to her good faith, they are to be deemed honorary obligations.

Whatever merit this suggestion may possess, it can have no place for consideration here. When a State enters into the markets of the world as a borrower, she, for the time, lays aside her sovereignty and becomes responsible as a civil corporation, And although suits against her even then may not be allowed, her officers can be compelled to do what she then contracts that they shall do. And as to these consolidated bonds, Louisiana has declared in her organic law that they created a valid contract between her and each and every holder, which she "shall by no means and in no wise impair," and that no court "shall enjoin the payment of the principal or interest thereof, or the levy and collection of the tax therefor," but that to secure them her judicial power shall be exercised when necessary. These engagements are not imperfect obligations, mere honorary promises, which she can keep or break without accountability.

If a State can successively repudiate her solemn obligations, can obtain the surrender of a large portion of the demands of her creditors upon pledges for the more prompt payment of the remainder, and then set aside as worthless the pledges given with no possibility of redress to the creditors, either by enforcement of the pledges, or by a return of the surrendered demands, what confidence can be reposed anywhere? Public faith will be the synonym of public dishonesty; and, as I stated on a former occasion: "If the government will not keep its faith, little better can be expected from the citizen. If contracts are not observed, no property will in the end be respected; and all history shows that rights of persons are unsafe when property is insecure. Protection to one goes with protection to the other, and there can be neither prosperity nor progress where this foundation of all just government is unsettled." *Sinking Fund Cases*, 99 U. S. 700, 767.

On the argument much weight was placed upon the decision of the Supreme Court of Louisiana in *State, ex rel. Hart*, v. *Burke*, 33 La. Ann. 498; and it is cited as authority to the point that no remedy by *mandamus* exists in the courts of the State to compel her officers to carry out her engagements; stated,

however, in the opinion as deciding that there is no remedy by *mandamus* or injunction against the State in its political capacity, a proposition which no one controverts. The case was similar in its character and objects to those now under consideration. And it was there held that the courts of Louisiana have no jurisdiction to entertain any judicial proceeding, the object of which is to enforce the performance of a contract or obligation of the State against her will; that they have no authority to declare that a provision of her Constitution does not express her will; and that they cannot annul a provision of that Constitution on the ground that it impairs the obligation of a contract with the State, because such a contract can never become the subject of judicial enforcement against her will. In these conclusions the court gave no force to the constitutional inhibition as against the State. It would seem as though it was of opinion that, in all matters of contract, the inhibition applies only to legislative action. It says: "We have been referred to authorities to the effect that where an officer pleads the authority of an unconstitutional law as a justification for the non-performance or violation of his duty, this will not prevent the issue of the writ. 9 Wheat. 859; 16 Wall. 220. This may be so when the authority invoked is a statute under the State Constitution; but it is different when the authority is an article in the Constitution itself." And the court proceeds to lay down the doctrine that clauses of the State Constitution, though violative of the Constitution of the United States, express the will of the State, and as such must be respected by her courts. In thus holding, the court would seem to have lost sight of two provisions of the Federal Constitution, one, which declares that "this Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land;" and the other, which declares that "the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." These provisions, which govern in Louisiana as well as in other States, being overlooked, and the inhibition against the impairment of the obligation of contracts being limited to legislative action only on the part of the State, so far as concerns her own contracts, it is not sur-

prising that the court held that the ordinance of repudiation and shame embodied in the new Constitution was to be obeyed; that its conflict with the Federal Constitution was to be disregarded, and that what the State was prohibited from doing should be deemed the legal expression of her will, and enforced as such. The decision rests upon the theory that a proceeding against the officers of the State to compel them to do their duty is a suit against the State; and that her consent to a suit against them has been withdrawn by clauses of the new Constitution. But if those clauses never lawfully became a part of the new Constitution, — because the State under the Federal Constitution was incapable of enacting them, — then her consent remains, and the present suits are simply attempts to compel her officers to do her lawful bidding. The State cannot speak through an enactment which contravenes the Federal Constitution.

There can be no doubt that, but for the Debt Ordinance in the Constitution of 1879, a *mandamus* or other compulsory process could have been issued by the courts of Louisiana to compel officers of the State, and of the board of liquidation, to execute the provisions of the act of 1874 and of the constitutional amendment of that year. The Code of Procedure of the State declares that the object of the writ "is to prevent a denial of justice or the consequence of defective police, and it should, therefore, be issued in all cases where the law has assigned no relief by the ordinary means, and where justice and reason require that some mode should exist of redressing a wrong or an abuse of any nature whatever," sect. 830; and that "it may be directed to public officers to compel them to fulfil any of the duties attached to their office, or which may be legally required of them." Sect. 834. These provisions are sufficiently comprehensive to embrace the present cases, and authorize compulsory process against the defendants to enforce the performance of the duties with which they are charged under the act and constitutional amendment of 1874.

But independently of them, the constitutional amendment of 1874 of itself invests the courts of the State with jurisdiction to issue such process, by the clause which declares that, to secure the levy, collection, and payment stipulated, "the judicial

power shall be exercised when necessary," and that means such power as properly belongs to judicial tribunals, to enforce the performance by public officers of duties imposed upon them by law.

In *Marbury* v. *Madison*, 1 Cranch, 137, the conditions under which the writ will be issued are stated as clearly and happily as anywhere in the reports; and though the case is familiar to all, some of the observations of the great Chief Justice, who there spoke for the court, may properly be repeated. The plaintiff there, as is well known, had been appointed a justice of the peace for the District of Columbia; his commission was signed by the President and sealed by the Secretary of State, but its delivery was refused by a new secretary succeeding to the one who had signed the commission. The court held that the plaintiff was entitled to his commission, and to withhold it was an act not warranted by law, but in violation of a vested right, and then proceeded to consider whether the laws of the country gave him a legal remedy. "The very essence of civil liberty," said Chief Justice Marshall, "certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the King himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court." And again: "The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case." He then shows that there was nothing in the character of the case or the nature of the transaction which exempted it from legal investigation or prevented the injured party from having redress; and, among other instances, he referred to the act of Congress of 1794, concerning invalids, as one where the performance of duties imposed upon the heads of departments might be enforced. "By the act concerning invalids, passed in June, 1794," he said, "the Secretary of War is ordered to place on the pension list all persons whose names are contained

in a report previously made by him to Congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that when the law in precise terms directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country? Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained. No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law." And again: "If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How, then, can this office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process? It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined."

If the act be one which involves discretion, the officer only conforms to the law in exercising that discretion. If it be one which calls for the consideration of evidence and the exercise of judgment, he must be left free to act upon his own conclusions. If, however, the act does not rest in his discretion; if it does not call for the exercise of judgment, but is a specific duty, imposed by law, and ministerial in its character, such as the delivery of a commission, the issue of a patent, the drawing of a warrant, or the payment of moneys appropriated (the subject to which the appropriation is made not calling for the exercise of judgment in its selection), and individuals have a direct pecuniary interest in the performance of that duty, — the officer is as much subject to the compulsory process of the judicial tribunals as a private citizen. If it were not so, our government would cease to be a government of laws, and the

obloquy to which Marshall refers would be cast on the jurisprudence of the country.

It is not, then, the office of the defendants which can preclude an inquiry into the propriety of calling upon the courts to enforce the performance of duties imposed by law upon them. The propriety of issuing the writ must be determined by the nature of the act to be done; whether it is one which they, under the law, are required to do.

No interference is sought with the general financial affairs of the State. These she may manage as she chooses. What is sought is an injunction to prevent her officers from diverting to other purposes funds collected for the payment of her creditors, and a direction to them to proceed and carry out her command as to the collection hereafter of the specific tax levied by herself, and the disbursement of its proceeds. The fact that she subsequently made an unconstitutional attempt to rescind that command cannot affect its character or efficacy.

In *Woodruff* v. *Trapnall*, 10 How. 190, decided in 1850, this court enforced a contract of the State of Arkansas in a proceeding by *mandamus* against one of her officers, compelling him to receive certain bills in satisfaction of a judgment recovered by the State, in the face of a subsequent statute prohibiting their receipt.

In *Hartman* v. *Greenhow*, 102 U. S. 672, decided only two years since, this court, with but a single dissenting voice, enforced a contract of the State of Virginia in a proceeding by *mandamus* against one of her officers, compelling him to receive coupons of certain bonds for taxes, pursuant to the law under which the bonds were issued, although a subsequent law of the State had forbidden their receipt. And the Supreme Court of Appeals of Virginia has, in similar cases, after mature consideration, asserted a like authority over officers of the State, never apparently imagining that the sovereignty of the Commonwealth was at all assailed by judicial process compelling them to do their duty. The Commonwealth has required no reminder from a Federal tribunal to awaken her attention to the invasion of any of her rights of sovereignty.

A number of other cases in this court and in the Circuit Courts might be cited to the same purport; and if the law re-

specting contracts with States, and rights of property acquired from States, is not to be subject to continual change, that law should remain undisturbed, having been recognized as sound for more than a third of a century. The doctrine of *stare decisis* is deemed of great importance on questions affecting private rights. Much more ought it to be respected and resolutely adhered to in determinations touching the limits of the powers of the Federal and State governments, and the authority of each over the contracts of States with individuals.

Nor can I perceive in what way the law, as thus pronounced, encroaches here upon any of the powers of the State. It is undoubtedly a matter of great importance, indeed of absolute necessity to wise government in this country, that there should be no interference with the rights of the States in the management of their local affairs, including in these the collection and disbursement of their revenues. But if a State contracts to do certain things, and in order that they may be performed subjects her officers to the control of the courts, and makes their refusal to carry out her pledges a felony, it cannot be justly contended that her reserved rights are at all invaded if her officers are judicially commanded to do what she says they shall do. No doctrine is here asserted in conflict with the exercise of any rightful authority of the State. All that is claimed is simply a right to compel her officers to obey her own enactments, such as were constitutionally passed, and thus became laws, and to disregard such as she had no power to pass. If the State is above the Constitution of the United States; if the protection of that instrument does not extend to her engagements with individuals; if her power is as absolute as that of the Parliament of England; if the theory of the Federal Constitution, that it binds States as well as individuals, is unsound; if it is not, as it declares itself to be, the supreme law of the land, — then my position falls; but otherwise there is no answer to it — at least none that I have been able to see.

MR. JUSTICE HARLAN. Having a deep conviction that the opinion of the court is in conflict with the spirit and tenor of our former decisions, subversive of long-established doctrines,

and dangerous to the national supremacy as defined and limited by the Constitution, I deem it my duty to dissent from it.

That the bonds and coupons issued by Louisiana, in pursuance of the statute and constitutional amendment of 1874, are contracts within the meaning of that clause of the Federal Constitution which declares that no State shall pass any law impairing the obligation of contracts; that the provisions in its new Constitution known as the "Debt Ordinance" of 1879 were intended to impair, and, if enforced, do impair, the obligation of those contracts; and that such ordinance is therefore a nullity as against the bondholders who do not accept its terms, — are propositions so manifestly correct as not to require argument in their support. Indeed, I understand the court, substantially, to concede them to be sound. As the Constitution of the United States is the supreme law of the land, "anything in the Constitution or laws of any State to the contrary notwithstanding," I had supposed that all State action, whether by legislative enactment or constitutional provision, must be disregarded when in conflict with that law. Yet this court holds that it cannot enforce or restrain the agents of a State from destroying the obligation of her contract with a citizen because such relief will require them, in the discharge of their official duties, to disobey the orders of what is denominated the *supreme political power* of that State. The court, it seems to me, in effect, adjudges that the defendants cannot be coerced by the courts of the Union to disregard nullifying enactments of their State, although such coercion, if employed, would only be for the purpose of enforcing the rightful authority of the Constitution. It appears upon the very face of these proceedings, and is not to be disguised, that those officers refuse to perform purely ministerial duties solely because the will of the State is, with them, paramount, and to be obeyed although thereby they destroy rights guaranteed by the supreme law of the land.

To state the proposition in another form: Here are contract rights which, but for the nullifying provisions in the new Constitution of Louisiana, the courts (as I will presently show) would unquestionably protect by the process of injunction, and also, if need be, by *mandamus* compelling the offi-

cers of the State to discharge plain official duties which require in their performance no exercise of discretion. Now, however, it is determined — if I do not misapprehend the decision — that the judicial arm of the nation is hopelessly paralyzed in the presence of an ordinance, destructive of those rights, and passed in admitted violation of the Constitution of the United States. A State — which "cannot be viewed as a single, unconnected, sovereign power," but is a member of the Union under a Constitution whose supremacy all must acknowledge — assumes to release its officers from the duty of obeying important provisions of that Constitution; and this court, it would seem, holds that, in cases like these, it has no power, as against such hostile State action, to require those officers to respect private rights guaranteed by such provisions.

1. What are the terms of the admitted contract between Louisiana and the holders of the consolidated bonds?

By the statute of 1874 a fixed annual tax is levied for the purpose of paying the principal and interest of the bonds authorized to be issued; the revenue therefrom is thereby "set apart and appropriated to that purpose and no other;" it is made a felony for any officer to divert it from that purpose; the interest tax is declared to be a continuing annual tax until the bonds, principal and interest, are paid or redeemed; the appropriation is made a continuing annual one during the same period; and the levy and appropriation, it is declared, shall authorize and make it the duty of the auditor and treasurer, and the board of liquidation, respectively, to annually collect the tax, pay the interest, and redeem the bonds, until they are fully discharged.

Each provision of the act is declared to be a contract between the State and each holder of the bonds; it is made a misdemeanor for any judge, tax-collector, or other officer to obstruct the execution of any part of it, or to fail to perform his official duty; tax-collectors are inhibited from paying over moneys so collected to any other person than the State treasurer; and it is provided that no court or judge of the State shall have power to enjoin the payment of principal or interest of the bonds or the collection of the special tax therefor.

These provisions were embodied in the Constitution of Lou-

isiana, by an amendment adopted in 1874; and with a view of facilitating the sale of the bonds, provided for in the act of that year, it declares that such issue creates "a valid contract between the State and each and every holder of said bonds, which the State shall by no means and in no wise impair;" that "no court shall enjoin the payment of the principal or interest thereof or the levy and collection of the taxes therefor;" that "to secure such levy, collection, and payment, the judicial power shall be exercised when necessary;" that the tax required for the payment of the principal and interest of such bonds "shall be assessed and collected each and every year until the bonds shall be paid, principal and interest, and the proceeds paid by the treasurer of the State to the holders of said bonds, as the principal and interest of the same shall fall due; and, lastly, "that no further legislation or appropriation shall be requisite for the said assessment and collection, and for such payment from the treasury."

With these statutory and constitutional provisions in force, the State issued bonds to the amount of about $12,000,000, and taxes were assessed, collected, and paid over to the State treasurer solely for the purpose of meeting their interest. Of the amount collected to pay coupons maturing Jan. 1, 1880, about $300,000 are in the State treasury. The State officers refuse to apply the money for that purpose or to take any steps toward further collections as enjoined by the statute and Constitution of 1874.

2. What has the State done that impairs the obligation of her contracts?

By her Debt Ordinance the coupons falling due the 1st of January, 1880, are "remitted" without the consent of creditors, and the interest tax already collected is therein directed to be used exclusively for the payment of the expenses of the State government. Unless the holders of consolidated bonds are paid out of this money, raised for their benefit exclusively, and unless future collections are made as required by the contract, they will be wholly without remedy, and their bonds will cease to have any value. Plainly that ordinance is a breach of the plighted faith of the State. The financial world, as we have seen, was assured by legislative enactment and constitutional

provision that what the State officers now propose to do should never be done; that those who took the bonds might rely upon a fixed annual levy to meet the principal and interest; that all money thereby raised should be applied exclusively to that purpose; and that not only the officers of the State should assess, collect, and pay as it stipulated, but that the power of the judiciary should be exercised, whenever necessary, to enforce the obligation of the contract. These laws, in their substantial provisions, are as binding on the State, and are as much a part of the contract, as if those provisions had been therein expressly set forth. *Bronson* v. *Kinzie*, 1 How. 311; *McCracken* v. *Hayward*, 2 id. 608; *Planters' Bank* v. *Sharp*, 6 id. 301; *Walker* v. *Whitehead*, 16 Wall. 314; *Edwards* v. *Kearzey*, 96 U. S. 595; *Louisiana* v. *New Orleans*, 102 id. 203.

The State has no more right by law to impair the obligation of its contracts than it has, by law, to impair the obligation of contracts between individuals. In *State of New Jersey* v. *Wilson*, the language of the court, speaking by Chief Justice Marshall, is: "In the case of *Fletcher* v. *Peck* it was decided in this court, on solemn argument and with much deliberation, that this provision of the Constitution [the contract clause] extends to contracts to which a State is a party, as well as to contracts between individuals." 7 Cranch, 164, 166. It is the settled doctrine of this court that contracts with States are as fully protected by the Constitution against impairment by State legislation as contracts between individuals. *Green* v. *Biddle*, 8 Wheat. 1; *Providence Bank* v. *Billings*, 4 Pet. 514; *Woodruff* v. *Trapnall*, 10 How. 190; *Wolff* v. *New Orleans*, 103 U. S. 358.

3. If the Debt Ordinance of Louisiana is in violation of the Constitution of the United States, and, therefore, a nullity as against the holders of consolidated bonds, — if the latter are entitled by the terms of their contract to be paid out of the moneys collected for their benefit and to have further collections made, — is there any mode, known to the law, by which their rights can be protected? My brethren of the majority answer this question in the negative when they adjudge that no relief whatever can be given in either of these suits. One is a suit in equity commenced in the Circuit Court of the

United States by holders of consolidated bonds to prevent, by injunction, officers of the State from using the proceeds of taxes already raised under the statute and Constitution of 1874, for any purpose other than that for which they were collected and paid to the State treasurer. In the other suit, the plaintiffs, holders of consolidated bonds, and citizens of New York, ask a *mandamus* against the State officers compelling the application of the moneys so collected to the payment of their coupons, and also the collection of taxes to meet future interest as it becomes due.

Some comment is made upon the extended nature of the relief asked by plaintiffs. It is sufficient to remark that the court is never bound to give relief to the full extent demanded; and all relief is not to be denied because more is asked than the court will grant under any circumstances, or in the particular case. And there is no ground, I submit, for the suggestion that granting relief would require the administration, by the court, of the general finances of the State. What should be done, if properly it may be, is, by necessary orders, to prevent the officers of the State from depriving creditors of moneys which by express contract have been set apart and appropriated exclusively to the payment of their claims. There is no obstacle to the payment out of that fund, except the prohibition in the void Debt Ordinance of 1879. It is distinctly admitted to be easily ascertainable from the accounts how much of the money in the treasury is applicable to this class of debts. Indeed, it appears from the opinion in *Newman* v. *Burke*, hereafter referred to, that the treasurer and fiscal agent of Louisiana held within their control, when these suits were commenced, all the moneys raised under the statute and Constitution of 1874 to meet the interest falling due Jan. 1, 1880. They have, in their hands, more than enough to pay the coupons of Jan. 1, 1880, held by the parties now before the court. Further, — a fact most significant in view of the suggestion that these moneys are mingled with other moneys in the State treasury, — the interest fund created to pay coupons maturing Jan. 1, 1880, were, by an act of the General Assembly of Louisiana, approved Jan. 4, 1882, directed to be invested in United States bonds. Acts La. 1881, p. 50. And it is not pre-

tended that payment from that fund will produce the slightest confusion in the treasurer's accounts, or involve the use of moneys raised for other and distinct purposes. If any confusion ensues from such an application of these moneys, it would be only of that kind which arises when the law prevents a repudiating debtor from misappropriating funds, in his hands, that have been dedicated to a specific purpose.

It is apparently urged, as an obstacle in the way of relief, that plaintiffs do not seek to have the proceeds of these taxes applied specially to the payment of their claims, but ask such orders as will enable all holders of consolidated bonds to participate in the distribution of the moneys raised under the statute and Constitution of 1874. Had the suit for a *mandamus* sought the application of the moneys solely to the payment of coupons held by the plaintiffs, it might, perhaps, have been urged as ground for its refusal, that each bondholder had an interest in the fund so created. *State, ex rel. Boyer*, v. *State Treasurer*, 32 La. Ann. 177. If the relief asked cannot be given for the benefit of all holders of consolidated bonds, there would seem to be no difficulty in restricting payments to such as are actually before the court in person or by representation. It is, however, proper to say that, notwithstanding the criticisms made by the court upon the nature and extent of the relief asked, I do not feel authorized to infer from its opinion that relief would be given to the parties before it, had they asked payment only of their coupons. The opinion seems to proceed upon the broad ground that, as Louisiana is not directly suable in its corporate capacity, the courts of the Union cannot reach its agents employed, under its orders, in the work of destroying the contract rights of the plaintiffs.

4. Are these suits forbidden by the Eleventh Amendment of the Federal Constitution, which declares that the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State? I understand the court, in effect, if not in terms, to hold that they cannot be maintained without violating that amendment.

The first authority cited in support of that view is *Reg.* v. *Lords Commissioners of the Treasury*, Law Rep. 7 Q. B. 387.

It appears that by an act of Parliament a round sum was appropriated to the Crown to be used in paying costs incurred in prosecutions at assizes and quarter sessions in England, formerly paid out of county rates. Bills of costs having been passed by local officers, certain items were disallowed and others reduced by the Lords of the Treasury. Subsequently a rule went against the latter to show cause why a writ of *mandamus* should not issue compelling them to pay these bills out of the funds appropriated to the Crown for such purposes. The judges, although of opinion that the defendants should be governed by the taxation of the local officers, declined to grant the writ. Cockburn, C. J., said: "The question comes to be, whether the Lords Commissioners of the Treasury, when this money gets into their hands, are bound to apply it as servants of the Crown, or as the servants of Parliament who vote the money." Blackburn, J., said: "The question remains, whether there is any statutable obligation cast upon the Lords of the Treasury to do what we are asked to compel them to do by *mandamus*, namely, to issue a minute to pay that money; because it seems to me clear that we have a right to grant a *mandamus* if there is such a statutory obligation, particularly when the application is made on behalf of persons who have a direct interest in the matter." Similar declarations were made by the other judges. They all concurred in denying the writ upon the ground that the money was voted, not to named officers to be by them applied to a designated purpose, but as "a supply to the Crown;" that the officers who distributed it for the purposes named acted as servants of the Crown, not as servants of Parliament; that a suit against those officers was, therefore, one against the sovereign, whom, said Chief Justice Cockburn, the Court of Queen's Bench had no power, even in appearance, to command.

It seems to me that case furnishes no support for the suggestion that these are suits against the State, simply because they are brought against its officers. It does not conflict with the proposition that the State treasurer can be compelled to apply the proceeds of these taxes as stipulated in the statute and Constitution of 1874, which were his sole authority to receive them. Here there *is a statutable* obligation upon him to

pay the coupons as they matured. And to that is added the obligation imposed by that Constitution, which, in terms, declares that the proceeds of taxes collected under the act of that year "shall be paid by the treasurer of the State to the holders of said bonds, as the principal and interest of the same shall fall due," without further legislative authority. These obligations remain upon that officer, unless it be that the Debt Ordinance, although unconstitutional and void, has discharged them. Had Parliament, instead of the act involved in the case cited, passed one directly imposing upon the defendants the duty of paying out of moneys appropriated for that purpose a certain class of claims, it is manifest that the Court of Queen's Bench would have compelled them, by *mandamus* or other process, to perform that duty. In the case supposed there would have been a statutable obligation which the court would not have permitted the defendants to evade on the pretext that they were officers of the Crown.

This distinction is well illustrated in *Grenville-Murray* v. *Earl of Clarendon*, Law Rep. 9 Eq. 11. There the plaintiff sought a decree for the value of diplomatic services alleged to have been rendered by him. He claimed that he was entitled to be paid out of certain money voted by Parliament to the Foreign Office. Lord Romilly, M. R., said: "It [the money so voted] is not paid in trust for any particular person. The case that was cited was to this effect: that if Parliament votes a sum of £1,000 to *John Smith*, and the treasury devote in their books the payment of that sum to other purposes, then a *mandamus* will lie to the treasury in order to pay that £1,000 to *John Smith*. But there is nothing of the sort here. Parliament has merely voted certain sums to her Majesty, and of these sums £600,000 are to be applied to the Foreign Office. The distribution of that amount is left to the officers of the Foreign Office to apply in such a manner as is most subservient to her Majesty's service and to the due support of the Foreign Office, and there is nothing whatever to connect the plaintiff with a penny of this money in any aspect. It is impossible for me, therefore, in that state of things, to say that there is any trust for him."

I refer also to *Rex* v. *Lords Commissioners of the Treas-*

ury, 4 Ad. & El. 286. That was an application for a *mandamus* against the defendants, who had authority by statute to grant a certain "superannuation allowance." Sir J. Campbell, attorney-general, contended that it was against principle that the court should order a *mandamus* in the name of the King, directing the King to pay money. But the *mandamus* was granted. Lord Denman, C. J., said: "If, then, this is only the case of public officers having the control of a sum of money for this particular purpose, there is no reason that a *mandamus* should not issue. They are officers under the Crown; but the Crown has no more to do with them for this purpose than any other officers. They are merely parties who have received a sum of money as trustees for an individual under the provisions of an act of Parliament. . . . Here it only appears that a sum of money has been voted as an allowance to an individual, which sum they have, and refuse to pay."

There is another consideration which strengthens this position, that is, the supremacy of the Constitution of the United States over State constitutions and State laws. To the duty imposed by the statute and Constitution of 1874 upon its officers there is superadded the duty imposed by the fundamental law of the land not to regard as binding any State enactment which impairs the obligation of contracts.

If the case cited from the Queen's Bench were susceptible of the construction put upon it by this court, it should not have controlling influence. Here no such relations exist between the executive and judicial departments as exist in England between the Crown and the courts. This was shown in the elaborate opinion of Mr. Justice Miller, speaking for the court in *United States* v. *Lee*, 106 U. S. 196. That was ejectment to recover real estate, in the actual possession of officers who claimed it, not in any personal right, but for the United States, — property used and occupied as a cemetery for dead soldiers of the Union. It was contended that a suit against the officers, having for its object to disturb their possession, was a suit against the government. In support of that position numerous cases were cited from the English courts, which held that a suit could not be maintained against officers of the Crown. But we held that upon such a question

but little weight should be given to those adjudications; that there is a vast difference in the essential character of the two governments in reference to the source and depositaries of power; that while in England the Crown, the fountain of honor, cannot be disturbed in its possession of property by process directed against its officers or agents, "under our system the people, who are there subjects, are sovereign;" that "their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of the monarch;" that "the citizen here knows no person, however near to those in power, or however powerful in himself, to whom he need yield the rights which the law secures to him when it is well administered;" that, "when he, in one of the courts of competent jurisdiction, has established his right of property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right." Said the court further, in that case: "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who, by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."

In that case the court reaffirms the doctrines of *Osborn* v. *Bank of the United States*, 9 Wheat. 738. The latter was a suit to recover moneys, which officers of the State of Ohio, in conformity with its statutes, had illegally taken from a bank of the United States. The suit being against the officers of the State, the objection was taken that it could not be sustained without the State itself being a party; that the State could not be sued; consequently, it was argued, the relief prayed — the restoration of the money — could not be granted. But to that objection the court, speaking by Chief Justice Marshall, — and this language is quoted ap-

provingly in *United States* v. *Lee*, — said: "If the State of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is, that as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best-established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would afford against him could his principal be joined in the suit."

The decision in that case has not been heretofore questioned in this court. It seems to establish, upon grounds which cannot well be shaken, that a suit against State officers, to prevent a threatened wrong to the injury of the citizen, is not necessarily a suit against the State within the meaning of the Eleventh Amendment of the Constitution; for, said Chief Justice Marshall, "the Eleventh Amendment, which restrains the jurisdiction granted by the Constitution over suits against States, is, of necessity, limited to those suits in which a State is a party to the record." Here, the State is not a party to the record. Here, officers of Louisiana only are parties defendants; and the relief asked is that they be required to perform purely ministerial duties imposed upon them by the statute and Constitution of 1874, whose provisions, as respects the matters now in issue, are still in force and obligatory, because never affected, modified, or repealed, otherwise than by a debt ordinance, subsequently adopted, conceded to be in conflict with the Constitution, and, therefore, absolutely void.

There are other decisions of this court still more directly in point. The leading one is *Davis* v. *Gray*, 16 Wall. 203. In that case it appears that the State of Texas made a grant of

lands to a railroad company, upon the basis of which bonds were issued known as land-grant mortgage bonds. They were sold in large numbers in this country and Europe. Subsequently the State, by provisions of its statutes and Constitution, attempted to repudiate and nullify its contract; and, in pursuance thereof, its officers proposed to issue patents to others for a part of the lands embraced in this grant. Thereupon a suit in equity was instituted in the Circuit Court of the United States against the Governor and the Commissioner of the General Land-Office of Texas, to prevent them from issuing patents for the lands or any part of them. The State was, of course, not made a party on the record. The bill was demurred to upon the ground that she could not be sued, and that the suit, being against her officers, was one, within the meaning of the Constitution, against her. The demurrer was overruled, and the relief asked was given.

Touching the question of jurisdiction, the court, speaking by Mr. Justice Swayne, stated these principles as having been announced in *Osborn* v. *Bank of the United States*. 1. A Circuit Court of the United States, in a proper case in equity, may enjoin a State officer from executing a State law in conflict with the Constitution, or a statute of the United States, when such execution will violate the rights of the complainant. 2. Where the State is concerned, the State should be made a party, if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record. 3. In deciding who are parties to the suit, the court will not look beyond the record. Making a State officer a party does not make the State a party, although her laws prompt his action, and the State stands behind him as the real party in interest. p. 220. It was in conformity with those doctrines that the relief asked was given. See also *Vattier* v. *Hinde*, 7 Pet. 252; *Louisville Railroad Co.* v. *Letson*, 2 How. 497; 2 Story's Const., sect. 1685; 1 Kent, Com. 351.

In part upon the authority of *Davis* v. *Gray* and *Osborn* v. *Bank of the United States*, this court, in *Board of Liquidation* v. *McComb*, 92 U. S. 531, 541, maintained the right of a holder

of consolidated bonds to a decree against the officers of the State of Louisiana, who are here defendants, constituting the board of liquidation, preventing the use of such bonds for the payment of a debt due from the State to a levee company. The proposed action of the board was based upon a statute passed March 2, 1875. So that the suit had for its object to prevent State officers, charged with the execution of the latter act, from carrying out its provisions. It never occurred to this court that the suit was, for that reason, one against the State within the meaning of the Constitution. Upon the general question, whether the defendants, being officers of the State, were amenable to process from a Federal court, Mr. Justice Bradley, speaking for this court, observed: "On this branch of the subject the numerous and well-considered cases heretofore decided by this court leave little to be said. The objections to proceeding against State officers by *mandamus* or injunction are: first, that it is, in effect, proceeding against the State itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A State, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled, that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such case, the writs of *mandamus* and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void." Upon these grounds, the decree of the Circuit Court was affirmed, so far as it prohibited the debt due the levee company from being funded in consolidated bonds. Such use of them was

deemed an impairment of the contract rights of those who were entitled to receive them.

It seems to me impossible, in view of our decision in that case, apart from previous decisions upon which it was founded, to hold that these suits are forbidden by the Eleventh Amendment of the Federal Constitution. We have adjudged that there is power in the courts of the Union, in a suit by an individual against State officers, to prevent them — in execution of an unconstitutional statute — from using these consolidated bonds for purposes inconsistent with the contract under which they were issued. In these cases, it is determined that those courts are powerless, in suits against such officers, to prevent the misapplication of moneys collected for the purpose of meeting the interest on those bonds; and this, in part, upon the ground that the relief asked will require the officers, who have charge of those moneys, to disregard the confessedly void orders of the supreme political power of the State.

It may be asked, When before has this court found the unconstitutional mandate of a State to be an obstacle in the way of compelling her officers to respect rights of contract, the obligation of which is protected against impairment by any law of the State? Of what value is the contract clause of the Federal Constitution if it cannot be enforced against hostile provisions of a State Constitution? This court said, in *Dodge* v. *Woolsey*, 18 How. 331, 360, that "a change of constitution cannot release a State from contracts made under a constitution which permits them to be made;" in *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 448, that a contract between Ohio and a bank in that State "was entitled to the protection of the Constitution of the United States against any law of Ohio impairing its obligation;" in *Railroad Company* v. *McClure*, 10 Wall. 511, 515, that "the Constitution of a State is undoubtedly a law," within the meaning of the contract clause of the Constitution, and that "a State can no more do what is thus forbidden by one than by the other, — there is the same impediment in the way of both;" in *White* v. *Hart*, 13 id. 646, 652, that "it is well settled by the adjudications of this court that a State can no more impair the obligation of a contract by adopting a constitution than by passing a law, — in the eye of the constitu-

tional inhibition they are substantially the same thing;" and in *Gunn* v. *Barry*, 15 Wall. 610, 623, that the Constitution of the United States "is above and beyond the power of Congress and the States, and is alike obligatory upon both; a State can no more impair an existing contract by a constitutional provision than by a legislative act; both are within the prohibition of the National Constitution." Why should these established doctrines of the court be overruled, as, for all practical purposes, they are, by the judgment this day rendered? The Constitution declares that it shall be the supreme law of the land, "anything in the Constitution or laws of any State to the contrary notwithstanding." Its mandate, in that respect, is addressed alike to the judges of the Federal and State courts, for it declares that "the judges in every State shall be bound thereby." And, as is said in *Dodge* v. *Woolsey*, "to make its supremacy more complete, impressive, and practical, that there should be no escape from its operation, and that its binding force upon the States and the members of Congress should be unmistakable, it is declared that "the senators and representatives, before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution."

Nor, if the relief here asked be granted, can I agree that the officers of the State cannot be protected against her subsequent action. If proceeded against because of their compliance with the judgments of the courts of the Union, the suit can ultimately be brought here for review, where no one will be permitted to suffer because of his obedience to the supreme law of the land.

Upon the general question of the power of the Circuit Court to grant a *mandamus* against State officers, there are some propositions announced by the court which should be examined. The fact is mentioned that the coupons held by plaintiffs have not been reduced to judgment, and it is said that the Circuit Court, in exercising its original jurisdiction, can ordinarily grant a writ of *mandamus* only in aid of some existing jurisdiction. As the State cannot be sued as a party defendant, to say that a judgment for the amount of the coupons is a condition prece-

dent to a *mandamus* is only another form of saying that there is no remedy whatever to prevent the misapplication of the moneys raised under the contract and by virtue of the statute and Constitution of 1874. The demands of the plaintiffs are not disputed, except upon the ground that the Debt Ordinance has assumed, without the consent of the State's creditors, to remit the interest falling due Jan. 1, 1880, and to divert the funds raised to meet it. The genuineness of the bonds and coupons is not questioned. The case, therefore, comes within the rule, explicitly laid down in McComb's and other cases, that *mandamus* will lie to compel the performance by a public officer of a plain ministerial duty, requiring no exercise of discretion. Such a remedy is absolutely essential for the protection of the rights here claimed.

Upon this question, reference is made by the court to *Bath County* v. *Amy*, 13 Wall. 244, and *Davenport* v. *County of Dodge*, 105 U. S. 237. In the first of those cases it was decided that the Circuit Court had no power, under the act of 1789, to issue a writ of *mandamus* except where necessary or ancillary to the exercise of its jurisdiction. And that doctrine was reaffirmed in *Davenport* v. *County of Dodge*, upon the authority of *Bath County* v. *Amy*, but without any question being raised in the former case as to the power of the Circuit Court to issue writs of *mandamus* since the passage of the act of March 3, 1875, c. 137. It will be found that the decision in *Bath County* v. *Amy* was based upon *McIntire* v. *Wood*, 7 Cranch, 504; *McClung* v. *Silliman*, 6 Wheat. 598; and *Kendall* v. *United States*, 12 Pet. 524.

In *McIntire* v. *Wood*, the Circuit Court was held to have authority to issue such writs only when necessary to the exercise of its jurisdiction. But it was said: "Had the 11th section of the Judiciary Act [the one declaring what suits shall be within the original cognizance of Circuit Courts] covered the whole ground of the Constitution, there would be much reason for exercising this power in many cases wherein some ministerial act is necessary to the completion of an individual right arising under the laws of the United States, and the 14th section of the same act would sanction the issuing of the writ for such a purpose. But although the judicial power of the

United States extends to cases arising under the laws of the United States, the legislature have not thought proper to delegate the exercise of that power to its Circuit Courts except in certain specified cases."

In *Kendall* v. *United States*, the previous cases were held to decide that the writ was appropriate to compel the performance of a ministerial act, necessary to the completion of an individual right arising under the laws of the United States. In all the cases prior to *Bath County* v. *Amy*, the want of power in the Circuit Court to issue the writ, in the first instance, and in advance of a judgment, establishing the rights of the parties, was put distinctly upon the ground that the whole judicial power of the United States had not been delegated to the Circuit Courts. In Kendall's case, however, the power of the Circuit Court in the District of Columbia, to compel the Postmaster-General by *mandamus* to perform a duty enjoined by an act of Congress, was sustained because, differently from the Circuit Courts in the several States, its jurisdiction then extended to all cases in law or equity arising under the laws of the United States. Now, it is apparent that the act of March 3, 1875, c. 137, supplies what in *McIntire* v. *Wood* and *McClung* v. *Silliman* was said to be wanting. It substantially "covers the whole ground of the Constitution." It invests the Circuit Courts with original jurisdiction, and with jurisdiction by removal from the State courts, of all suits at law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority; or in which the United States are plaintiffs or petitioners; or in which there is a controversy between citizens of different States; or a controversy between citizens of a State and foreign States, citizens, or subjects; or a controversy between citizens of the same State claiming lands under grants of different States.

It seems to me entirely clear that since the act of March 3, 1875, c. 137, enlarged the jurisdiction of the Circuit Courts, they have power, in the first instance, and in advance of a judgment to issue a *mandamus*, to compel the performance of purely ministerial acts, which require no exercise of discretion,

and are necessary to the protection or completion of an individual right arising under the Constitution or the laws of the United States. Unless the Circuit Court can, by injunction, prevent the State officers from doing what they propose to do, and, by *mandamus*, compel them to perform the ministerial acts enjoined by the statute and Constitution of 1874, then its new and enlarged jurisdiction is of no practical value in any case where a State determines to repudiate its contracts and to enforce ordinances impairing their obligation. The power has always existed in those courts to issue such writs, not specifically provided by statute, as "may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." 1 Stat. 81, 334; Rev. Stat., sect. 716. Jurisdiction to hear and determine a suit arising under the Constitution and laws of the United States carries with it the power to issue either a *mandamus* or an injunction, or both, when essential to the protection and enforcement of the rights involved. In such cases the writ is, in every legal sense, not simply necessary, but vital to the exercise of the jurisdiction granted.

It must also be observed that the *mandamus* suit was commenced in an inferior court of the State, and thence removed into the Circuit Court of the United States. If the power of the latter depended upon the question whether the State court could, by *mandamus*, compel a State officer to perform plain official duties imposed by law, the writ should be awarded. This court, I submit with great confidence, is in error if it means to say that *State, ex rel. Hart*, v. *Burke*, 33 La. Ann. 498, decides, or that the Supreme Court of Louisiana has ever decided, that the courts of that State cannot, under any circumstances, compel her officers, by *mandamus*, to perform plain official duties requiring no discretion. The State Code of Procedure expressly declares that the writ "may be directed to public officers to compel them to fulfil any of the duties attached to their office, or which may be legally required of them." Sect. 834. It is, I think, clear that but for the Debt Ordinance the court would have sustained the writ in that case, and compelled the officers to obey the statute and Constitution of 1874. What the court adjudged was that while an

officer could not plead the authority of an unconstitutional statute as a justification for the non-performance or the violation of his duty, it was different where the authority is an article in the State Constitution. Upon that ground alone the writ was refused.

That I do not misinterpret that case is clear from *Newman* v. *Burke*, determined in April, 1882. Newman, holding warrants on the general fund of the State for 1880 and 1881, claimed that by virtue of the Debt Ordinance he was entitled to be paid out of moneys in the hands of State officers, collected under the statute and Constitution of 1874, and by that ordinance directed to be transferred to the general fund. He obtained by the judgment of the Supreme Court of the State an order for a *mandamus* against the State treasurer and fiscal agent, directing them to conform their books to the requirements of the Debt Ordinance, subject, however, to the right and duty of those officers "to retain *in statu quo* so much of the fund in controversy as may be necessary to satisfy the pending claims of S. J. Hart and John Elliott *et al.*, . . . in case judgment should be rendered in their favor in the judicial proceedings instituted by them, and now pending in the Supreme Court of the United States." Thus, it seems that those officers, with the approval of the Supreme Court of Louisiana, only await the final determination of these suits to ascertain whether they will be permitted to execute a State ordinance in conflict with the Federal Constitution.

The State court, affirming the doctrines of *State, ex rel. Hart*, v. *Burke*, said: "Inasmuch as no court can ever acquire jurisdiction over a State, or to enforce a contract of a State against her will, it follows that no court can ever have power to decree the invalidity of any provision of the State Constitution on the ground that it impairs the obligation of such a contract. But unless the court may decree the nullity of such a provision, on such a ground, it follows that it cannot compel the officers of the State to do anything in violation thereof, because the Constitution of the State is their exclusive mandate and absolutely binding on them."

This language needs no interpretation. While the Federal Constitution declares that it shall be the supreme law of the

land, anything in the Constitution of any State to the contrary notwithstanding, the Supreme Court of Louisiana holds that, in the matter of State contracts, her Constitution is the exclusive mandate to her officers, and absolutely binding upon them, anything in the Constitution of the United States to the contrary notwithstanding. And I take leave to say, with all respect for my brethren, that the decision this day rendered can be sustained upon no other ground than that taken by the State court. But in vain has this court repeatedly adjudged that a suit against the officers of a State to enforce the performance of plain official duties is not, necessarily, one against the State within the meaning of that Constitution; in vain has it often decided that contracts with States are as fully protected by that Constitution as are those between individuals, and that a State can no more impair an existing contract by constitutional provision than by legislative act; in vain have the Circuit Courts of the United States been invested with jurisdiction of all suits arising under the Constitution and laws of the United States; in vain does that Constitution declare that it shall be the supreme law of the land, binding upon the judges in every State, — if it be true, as determined by the Supreme Court of Louisiana, that no court can ever have power either to decree a provision of a State Constitution invalid on the ground that it impairs the obligation of contracts with that State, or to compel State officers to disregard such invalid provision.

As further evidence that the State court recognizes the right to a *mandamus* compelling State officers to discharge ministerial duties, imposed by provisions of the Debt Ordinance, I refer to *State, ex rel. Ecuyer*, v. *Burke*, 33 La. Ann. 969. Ecuyer was the owner of certain consolidated bonds, issued under the act of 1874. He concluded to accept the provisions of the Debt Ordinance of 1879, and, in conformity therewith, applied to the State treasurer to have his bonds stamped, so as to show that he acceded to the reduction of interest made by that ordinance. That officer declining to comply with this request, an application was made to an inferior State court to compel him to stamp them. His refusal to comply with the relator's demands was based in part upon a statute passed in 1880 (after the debt

ordinance went into operation), which declares that no bond shall be stamped until the coupon of January, 1880, is surrendered. That the relator did not do. A *mandamus* was refused; but the Supreme Court, after deciding that the act of 1880 was inoperative, because in conflict with the Debt Ordinance, said: "In his answer, defendant alleges that the service required of him by relator is not a ministerial duty, and that the judiciary has no control over the executive and co-ordinate branches of the government, except as regards purely ministerial duties of executive officers. As regards the first proposition, we decide that the service required in this case is the performance of a purely ministerial duty, and this is too plain to require argument. As to the second proposition, it is elementary; but while fully recognizing the independence and all the rights of the co-ordinate branches of the government, it is only necessary to say that it is the province and duty of the judiciary, whenever the question is properly brought before it in judicial proceedings, to decide whether duties sought to be enforced at the hands of officers are or are not ministerial, and that it is of the essence of the judiciary to adjudge such questions, as otherwise those officers would themselves, by their own decision, be judges of their legal and constitutional powers." The judgment of the lower court was reversed, and the *mandamus* ordered to be issued, at the costs of the State treasurer in both courts.

Thus it is shown that the same court which determined *State, ex rel. Hart*, v. *Burke* has decided that the courts of Louisiana have power, by *mandamus*, to compel an officer of the State to discharge ministerial duties, requiring in their performance no discretion upon his part; especially when necessary to enforce a provision in the State Constitution in conflict with the Constitution of the United States.

It would seem, then, that holders of the consolidated bonds of Louisiana are in this anomalous condition: While her courts, because of the Debt Ordinance in the new Constitution, will not, by *mandamus*, compel her officers to perform the purely ministerial duties imposed by the statute and Constitution of 1874, but will, by using that writ, require those officers to execute the provisions of that ordinance, although it is confessedly in conflict with the Federal Constitution, the courts of the

United States, though now invested with jurisdiction of all suits arising under the Constitution and the laws of the United States, are, according to the present decision, without power to compel those officers to respect the inhibition in the supreme law of the land against State laws impairing the obligation of contracts. Such are the results which follow from the action of the "supreme political power" of a State whose officers, sworn to support the Constitution of the United States, are required by the State court, and now permitted by this court, to regard the State Constitution as their "exclusive mandate and absolutely binding on them."

My own conclusions are: —

That the officers of Louisiana cannot rightfully execute provisions of its Constitution which conflict with the supreme law of the land, and the courts of the Union should not permit them to do so;

That but for the adoption of the unconstitutional Debt Ordinance of 1879, and whether the suits were in a State court or in the Circuit Court of the United States, these State officers would have been restrained by injunction from diverting the funds collected to meet the interest on the consolidated bonds, and would have been compelled, by *mandamus*, to perform the purely ministerial duties enjoined by the statute and Constitution of 1874;

That if by existing laws the Circuit Court of the United States has no power to issue such writs, still, upon the removal of the *mandamus* suit from the State court, the former had power to do what the State court could legally have done had there been no removal, viz., make peremptory the alternative *mandamus* granted at the beginning of the suit by the inferior State court;

That the Debt Ordinance, being void because in conflict with the Constitution of the United States, furnishes no reason whatever — least of all in the courts of the Union — why the relief asked should not be granted by any court of proper jurisdiction as to parties;

That to refuse relief because of the command of a State to its officers to do that which is forbidden, and refrain from doing that which is enjoined, by the supreme law of the land; or to

give effect, for any purpose, in the courts of the Union, to the orders of the supreme political power of a State, made in defiance of the Constitution of the United States, is, practically, to announce that, so far as judicial action is concerned, a State may, by nullifying provisions in its fundamental law, destroy rights of contract, the obligation of which the Constitution declares shall not be impaired by any State law. To such a doctrine I can never give my assent.

I am, therefore, unable to concur in the opinion and judgment of the court.

ANTONI v. GREENHOW.

1. By issuing, pursuant to her "funding act" of March 30, 1871, her bonds with interest coupons thereto attached, the State of Virginia entered into a valid contract with every holder of the coupons, whereby she bound herself to receive them at and after their maturity for all taxes and demands due the State. So much of any enactment as forbids the receipt of the coupons for such taxes and demands impairs the obligation of the contract, and is void.
2. When the coupons were issued, the holder of them could, by the then existing law of the State, as interpreted by her court of last resort, enforce his right under the contract by suing out of that court a *mandamus* compelling the receipt of them by the proper tax-collector, who had refused to accept them when duly offered in payment of State taxes; and the plaintiff, if on the return to the writ judgment was rendered in his favor, could furthermore recover his costs with such damages as a jury might assess, and have forthwith a peremptory writ. By sect. 4 of an act passed Jan. 14, 1882, *post*, p. 771, when in such a case a *mandamus* is prayed for against the collector, the law imposes upon him as a duty to answer that he is ready to receive the offered coupon as soon as it shall be ascertained to be genuine and legally receivable for taxes. The taxpayer is then required to pay his taxes in lawful money, and file his coupon in the Court of Appeals, by which it is forwarded to the county court of the county, or to the hustings court of the city, where the taxes are payable, with directions to frame an issue as to whether it is genuine and legally receivable for taxes. Each party is entitled to exceptions and an appeal. If the issue is found for the petitioner, a *mandamus* is issued, and the money he paid is to be refunded to him out of the State treasury, in preference to all other claims. *Held*, that said sect. 4 furnishes an adequate and efficacious remedy substantially equivalent to that which existed at the date when the coupons were issued, whereby the rights of the holder of them, in case the collector refuses to receive them for taxes, can be maintained and enforced, and that the obligation of his contract with the State is not thereby impaired.

8. The court does not decide whether the act of the legislature, *post*, p. 779, approved April 7, 1882, after this suit was brought, repeals said sect. 4 of the act of Jan. 14, 1882, but holds that, if such is its effect, the remedy of the taxpayer is not rendered less efficient, inasmuch as the remaining sections furnish a proceeding which is an exact equivalent of that by *mandamus*, the real matter submitted for determination being whether his coupon ought to have been received in payment of his taxes; and if the issue is found for him, the provision is, without further legislative action, sufficient to authorize and require that the money which he deposited for that purpose shall be refunded to him from the State treasury.

ERROR to the Supreme Court of Appeals of the State of Virginia.

The case is stated in the opinion of the court.

Mr. William L. Royall for the plaintiff in error.

Mr. Frank S. Blair, Attorney-General of Virginia, for the defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

On the 30th of March, 1871, the General Assembly of Virginia passed an act to provide for the funding and payment of the public debt, by which two-thirds of the amount due on old bonds might be funded in new bonds, with interest coupons attached "receivable at and after maturity for all taxes, debts, dues, and demands due the State." Under this act many bonds were put out with coupons which expressed on their face that they were receivable for taxes. On the 7th of March, 1872, however, the General Assembly passed another act prohibiting the officers charged by law with the collection of taxes from receiving in payment anything else than gold and silver coin, United States treasury notes, and notes of the national banks, and repealing all other acts inconsistent therewith.

The Supreme Court of Appeals of Virginia decided, at its November Term, 1872, in *Antoni* v. *Wright*, 22 Gratt. 833, that in issuing these bonds the State entered into a valid contract with all persons taking the coupons to receive them in payment of taxes and State dues, and that the act of 1872, so far as it conflicted with this contract, was void. The authority of this case was recognized in *Wise* v. *Rogers*, 24 id. 169; and in *Clarke* v. *Tyler*, 30 id. 134, 137, decided in 1878, it was said: "This

decision of *Antoni* v. *Wright* . . . must be held to be the settled law of this State." The same questions were decided in the same way here at the October Term, 1880, in *Greenhow v. Hartman*, 102 U. S. 672, and are no longer open in this court. Any act of the State which forbids the receipt of these coupons for taxes is a violation of the contract and void as against coupon-holders.

At the time the act of 1871 was passed, and when the bonds and coupons were issued, the Supreme Court of Appeals of the State had jurisdiction to grant a *mandamus* in any cases where the writ would lie, according to the principles of the common law, if necessary to prevent a failure of justice; and in *Antoni* v. *Wright*, *ubi supra*, it was decided that a *mandamus* was the proper remedy to compel a collector to accept the coupons in question when offered in payment of taxes. *Wise* v. *Rogers* presented the same question, and we understand it to have been the settled practice of that court to entertain suits for similar relief.

The form and mode of proceeding were regulated by statute. Sect. 1, c. 151, of the Code of Virginia, 1873, p. 1028, provided that the return to a writ of *mandamus* should state plainly and concisely the matter of law or fact relied on in opposition to the complaint; that the complainant might thereupon demur to the return, or plead thereto, or both, and that the defendant might reply, take issue on, or demur to the pleas of the complainant. The case was to be tried at the place where writs of error to the court were to be tried, and after a verdict was found, or judgment rendered on demurrer or otherwise for the person suing out the writ, he could recover his costs, with such damages as the jury might assess, and have forthwith a peremptory writ. Code, p. 1051.

On the 14th of January, 1882, the General Assembly passed the following act: —

"CHAP. 7. — *An Act to prevent frauds upon the Commonwealth and the holders of her securities in the collection and disbursement of revenues.*

"Whereas, bonds purporting to be the bonds of this Commonwealth, issued by authority of the act of March thirtieth, eighteen hundred and seventy-one, entitled an act to provide for the funding and payment of the public debt, and under the act of March twenty-eight, eighteen hundred and seventy-nine, entitled an act

to provide a plan of settlement of the public debt, are in existence without authority of law;

"And whereas, other such bonds are in existence which are spurious, stolen, or forged, which bonds bear coupons in the similitude of genuine coupons, receivable for all taxes, debts, and demands due the Commonwealth;

"And whereas, the coupons from such spurious, stolen, or forged bonds are received in payment of taxes, debts, and demands;

"And whereas, genuine coupons from genuine bonds, after having been received in payment of taxes, debts, and demands, are fraudulently reissued, and received more than once in such payments;

"And whereas, such frauds on the rights of the holders of the aforesaid bonds impair the contract made by the Commonwealth with them, that the coupons thereon should be received in payment of all taxes, debts, and demands due the said Commonwealth, and at the same time defraud her out of her revenues;

"Therefore, for the purpose of protecting the rights of said bondholders and of enforcing the said contract between them and the Commonwealth, preventing frauds in the revenue of the same,

"1. *Be it enacted by the General Assembly of Virginia*, That whenever any taxpayer or his agent shall tender to any person whose duty it is to collect or receive taxes, debts, or demands due the Commonwealth, any papers or instruments in print, writing, or engraving, purporting to be coupons detached from bonds of the Commonwealth issued under the act of eighteen hundred and seventy-one, entitled an act to fund the public debt, in payment of any such taxes, debts, and demands, the person to whom such papers are tendered shall receive the same, giving the party tendering a receipt stating that he has received the same for the purpose of identification and verification.

"2. He shall at the same time require such taxpayer to pay his taxes in coin, legal-tender notes, or national-bank bills, and upon payment give him a receipt for the same. In case of refusal to pay, the taxes due shall be collected as all other delinquent taxes are collected.

"3. He shall mark each paper as coupons so received, with the initials of the taxpayer from whom received, and the date of receipt, and shall deliver the same, securely sealed up, to the judge of the county court of the county or hustings court of the city in which such taxes, debts, or demands are payable. The taxpayer shall thereupon be at liberty to file his petition in said county court against the Commonwealth. A summons to answer which petition shall be served on the Commonwealth's attorney, who shall appear and defend the

same. The petition shall allege that he has tendered certain coupons in payment of his taxes, debts, and demands, and pray that a jury be impanelled to try whether they are genuine, legal coupons, which are legally receivable for taxes, debts, and demands. Upon this petition an issue shall be made in behalf of the Commonwealth which shall be tried by a jury, and either party shall have a right to exceptions on the trial and of appeal to the Circuit Court and Court of Appeals. If it be finally decided in favor of the petitioner that the coupons tendered by him are genuine, legal coupons, which are legally receivable for taxes, and so forth, then the judgment of the court shall be certified to the treasurer, who, upon the receipt thereof, shall receive said coupons for taxes and shall refund the money before then paid for his taxes by the taxpayer out of the first money in the treasury, in preference to all other claims.

"4. Whenever any taxpayer shall apply to any court in this Commonwealth for a *mandamus* to compel any person authorized to receive or collect taxes, debts, or demands due the Commonwealth to receive coupons for taxes, it shall be the duty of such person to make return to said *mandamus*, that he is ready to receive said coupons in payment of such taxes, debts, and demands as soon as they have been legally ascertained to be genuine, and the coupons which by law are actually receivable. Upon such return, the court before whom the application is made shall require the petitioner to pay his taxes to the tax-collector of his county or city, or to the treasurer of the Commonwealth, and upon filing the receipt for such taxes in such court the said court shall direct the petitioner to file his coupons in such court, which shall then forward the same to the county court of the county or hustings court of the city where such taxes are payable, and direct such court to frame an issue between the petitioner as plaintiff and the Commonwealth as defendant as to whether the coupons so tendered are genuine coupons, legally receivable for taxes. On the trial of the cause the attorney for the Commonwealth in the lower courts, and the attorney-general in the Supreme Court of Appeals, shall appear for the Commonwealth and require proof of the genuineness and legality of the coupons in issue. Either party shall be entitled to exceptions, and an appeal to the Circuit Court and Supreme Court of Appeals on the trial of this issue. If the decision be finally in favor of the petitioner, the *mandamus* shall issue requiring the coupons to be received for said taxes, and so forth; and they shall be so received; and on the certificate of such judgment the treasurer of the Commonwealth shall forthwith refund to the taxpayer the amount

of currency or money before then paid by him out of the first money in the treasury, in preference to all other claims.

"5. This act shall be in force from its passage."

On the 20th of March, 1882, Andrew Antoni, who owed the State taxes to the amount of three dollars and fifteen cents, tendered in payment, to the treasurer of the city of Richmond, the tax-collector, fifteen cents in lawful money, and a coupon, of the issue of 1871, for three dollars. This tender was refused, and Antoni, on the 28th of March, petitioned the Supreme Court of Appeals for a *mandamus* to require its acceptance. The treasurer, on the 30th of March, for a return to an order to show cause, said that he was ready to receive the coupon as soon as it had been legally ascertained to be genuine, and such as by law was actually receivable. To this return a demurrer was filed. Upon the hearing of the demurrer, the court being equally divided in opinion on the questions involved, "in pursuance of an act of assembly in such case made and provided," denied the writ. From a judgment to that effect this writ of error was brought.

The question we are now to consider is not whether, if the coupon tendered is in fact genuine and such as ought, under the contract, to be received, and the tender is kept good, the treasurer can proceed to collect the tax by distraint or such other process as the law allows, without making himself personally responsible for any trespass he may commit, but whether the act of 1882 violates any implied obligation of the State in respect to the remedies that may be employed for the enforcement of its contract, if the collector refuses to take the coupon.

It cannot be denied that, as a general rule, laws applicable to the case which are in force at the time and place of making a contract enter into and form part of the contract itself, and "that this embraces alike those laws which affect its validity, construction, discharge, and enforcement." *Walker* v. *Whitehead*, 16 Wall. 314, 317. But it is equally well settled that changes in the forms of action and modes of proceeding do not amount to an impairment of the obligations of a contract, if an adequate and efficacious remedy is left. This limitation upon the prohibitory clause of the Constitution in respect to the

legislative power of the States over the obligation of contracts was suggested by Chief Justice Marshall in *Sturges* v. *Crowninshield*, 4 Wheat. 122, and has been uniformly acted on since. *Mason* v. *Haile*, 12 Wheat. 370; *Bronson* v. *Kinzie*, 1 How. 311; *Von Hoffman* v. *City of Quincy*, 4 Wall. 535; *Drehman* v. *Stifle*, 8 id. 595; *Gunn* v. *Barry*, 15 id. 611; *Walker* v. *Whitehead*, 16 id. 314; *Terry* v. *Anderson*, 95 U. S. 628; *Tennessee* v. *Sneed*, 96 id. 69; *Louisiana* v. *Pilsbury*, 105 id. 278. As was very properly said by Mr. Justice Swayne in *Von Hoffman* v. *City of Quincy*, *ubi supra*, "It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition of the Constitution, and to that extent void." p. 553. In all such cases the question becomes, therefore, one of reasonableness, and of that the legislature is primarily the judge. *Jackson* v. *Lamphire*, 3 Pet. 280; *Terry* v. *Anderson*, *ubi supra*. We ought never to overrule the decision of the legislative department of the government, unless a palpable error has been committed. If a state of facts could exist that would justify the change in a remedy which has been made, we must presume it did exist, and that the law was passed on that account. *Munn* v. *Illinois*, 94 U. S. 113. We have nothing to do with the motives of the legislature, if what they do is within the scope of their powers under the Constitution.

The right of the coupon-holder is to have his coupon received for taxes when offered. The question here is not as to that right, but as to the remedy the holder has for its enforcement when denied. At the time the coupon was issued, there was a remedy by *mandamus* from the Supreme Court of Appeals to compel the tax-collector to take the coupon and cancel the tax. This implied a suit, with process, pleadings, issues, trial, and judgment. No restrictions were placed on the defences the collector could make. He might raise such issues as he chose.

Without the aid of some restraining power, the mere pendency of the suit would not prevent the collector from proceeding according to law with the collection of the tax. He might, if he went on, subject himself to liability for damages, if the tender was one he ought to have accepted; but there was nothing to prevent his going on if he chose to take this risk.

Under this law the trial must be had in the Supreme Court of Appeals at the time and place where it was to be held for other purposes. There was nothing in the law to give the case preference over others for trial. So far as we are informed, it stood as other cases before the court, and was subject to such orders as should seem to be reasonable. The tax-collector could not be compelled to accept the coupon and discharge the tax until final judgment. If the final judgment was in favor of the holder, he recovered his costs and such damages as the jury might give him.

Under sect. 4 of the act of 1882, when a *mandamus* is asked for, the collector is required by law to return to the alternative writ or rule "that he is ready to receive said coupons in payment of such taxes, . . . as soon as they have been legally ascertained to be genuine, and the coupons which by law are actually receivable." Upon such return the court must require the petitioner to pay his taxes, which being done the coupons are taken and forwarded to the county court of the county or the hustings court of the city where the taxes are payable, with directions to that court to frame an issue between the petitioner as plaintiff and the Commonwealth as defendant, as to whether the coupons so tendered are genuine coupons, legally receivable for taxes. Upon this issue proof of the genuineness and legality of the coupons must be made. Either party may take exceptions and carry the case, on appeal, to the Circuit Court and the Supreme Court of Appeals. If the decision is in favor of the petitioner, a *mandamus* is to issue and the money he paid returned to him out of the first money in the treasury, in preference to all other claims.

The following changes are thus made in the old remedy: 1. The taxes actually due must be paid in money before the court can proceed, after the collector has signified in the proper way his willingness to receive the coupons, if they are genuine

and in law receivable; 2. The coupons must be filed in the Court of Appeals; and, 3. They must be sent to the local court to have the fact of their genuineness and receivability determined, subject to an appeal to the Circuit Court and the Supreme Court of Appeals. As the suit is for a *mandamus*, all the provisions of the general law regulating the practice not inconsistent with the new law remain; and if the petitioner succeeds in getting his peremptory writ he will recover his costs. No issues are required that it would not have been in the power of the collector to raise before the change was made, and there is no additional burden of proof imposed to meet the issues; so that the simple question is, whether the requirement of the advance of the taxes, and the change of the place and manner of trial, impair the obligation of the contract on the part of the State to furnish an adequate and efficacious remedy to compel a tax-collector to receive the coupons in payment of taxes, in case he will not do it without compulsion.

1. As to the payment of the taxes in advance.

In this connection it must be borne in mind that the legislation, the validity of which is involved, relates alone to the collection of taxes levied under the authority of the State for the purposes of revenue. Promptness in the payment of taxes by the citizen is as important as promptness by the State in the discharge of its own obligations. In fact, ordinarily the last cannot be done without the first. Hence, under the revenue system of the United States, the collection of the revenue in the manner prescribed by law cannot be restrained by judicial proceedings. The only remedy for an illegal exaction is payment under protest and a suit to recover back the money paid. The reason is, that as it is necessary the government should be able to calculate with certainty on its revenues, it is better that the individual should be required to pay what is demanded under the forms of law, and sue to recover back what he pays, than that the government should be embarrassed in its operations by a stay of collection.

It is to be noticed also that the law which authorized the issue of the bonds and coupons did not in express terms provide that the coupon-holder should have the remedy of *mandamus* to compel the tax-collector to take his coupons. His claim to

relief in that way rests alone on the fact, that when his coupon was issued *mandamus* was an existing form of action in the State, which the courts have decided was applicable to such a case. What the legislature has done is only to say, that before this remedy can be resorted to the amount due for taxes shall be deposited in the treasury. That being done, the suit may go on. If in the suit it shall be determined that the coupons tendered are genuine and in law receivable, the collector will be required to accept them, and the money will be restored. If, however, the judgment is against the coupon-holder, the taxes will be paid, and the State will have suffered no inconvenience for want of its just revenues. Looking at the case, therefore, as one affecting the collection of the public revenue, we cannot see that the requirement of the advance of the taxes as a condition to the employment of the remedy is such an impairment of the contract as makes the requirement invalid.

2. As to the change in the place and mode of trial.

We cannot think this of itself invalidates the law. So far as the change of place is concerned, it simply takes from the Supreme Court of Appeals jurisdiction for the trial of the questions of fact, and confers precisely the same jurisdiction upon another court, with ample provision for appeal, so that in the end the authority of the Court of Appeals may be invoked on all matters of law. The courts on which the new jurisdiction is conferred are required by law to hold frequent terms, and the trial is to be had in the county where the taxes are to be paid. It is difficult to see how this impairs, in any manner, either the adequacy or the efficiency of the original remedy.

Then, as to the manner of the trial. The deposit of the coupons with the Court of Appeals, if the suit is to go on, cannot be considered unreasonable. If the trial had been conducted under the old law, the coupons would have to be at some time surrendered, and the precise stage of the case in which this is to be done is by no means important, so far as the present question is concerned. Neither does the positive requirement of an issue as to the genuineness and receivability of the coupons and a trial by jury affect the validity of the law. Under the old law, this same issue might have been raised, and the same trial by jury required. It certainly is not an impair-

ment of an old remedy to make that imperative which before was discretionary.

Without pursuing the subject further, we say that, in our opinion, the fourth section of the act of 1882 does not impair the obligation of any contract which the State has made with the holders of its interest coupons.

After this suit was begun, but before it was tried, the General Assembly of Virginia, by an act approved April 7, 1882, amended the section of the code conferring jurisdiction on the Supreme Court of Appeals in suits for *mandamus*, so that it now reads as follows: —

"CHAP. 19. — *An Act to amend and re-enact section four, chapter one hundred and fifty-six, of the code of eighteen hundred and seventy-three, in relation to mandamus, prohibition, &c.*

1. "*Be it enacted by the General Assembly of Virginia*, That chapter one hundred and fifty-six, section four, of the Code of Virginia of eighteen hundred and seventy-three, be amended and re-enacted, so as to read as follows: —

"SECT. 4. The said Supreme Court, besides having jurisdiction of all such matters as are now pending therein, shall have jurisdiction to issue writs of *mandamus* and prohibition to the circuit and corporation courts, and to the hustings court and the chancery court of the city of Richmond, and in all other cases in which it may be necessary to prevent a failure of justice, in which a *mandamus* may issue according to the principles of the common law, provided that no writ of *mandamus*, prohibition, or any other summary process whatever, shall issue in any case of the collection or attempt to collect revenue, or compel the collecting officers to receive anything in payment of taxes other than as provided in chapter forty-one, acts of assembly, approved January twenty-six, eighteen hundred and eighty-two, or in any case arising out of the collection of revenue in which the applicant for the writ of process has any other remedy adequate for the protection and enforcement of his individual right, claim, and demand, if just.

"The practice and proceedings upon such writs shall be governed and regulated, in all cases, by the principles and practice now prevailing in respect to writs of *mandamus* and prohibition respectively.

"2. This act shall be in force from its passage."

This, it is claimed, repealed sect. 4 of the act of January, 1882, and took away entirely the remedy by *mandamus*. Without deciding that question we proceed to consider the remedy provided in sects. 1, 2, and 3 of the act of 1882, which, it is conceded, will remain in force even if sect. 4 is repealed. These sections provide, in substance, that if coupons are tendered in payment of taxes, the collector shall take and receipt for them for the purposes of identification and verification. He shall then require payment of the taxes in money, and after marking the coupons with the initials of the name of the owner, deliver them to the judge of the county court of the county or hustings court of the city where the taxes are payable. The taxpayer may then file his petition in the county or hustings court against the Commonwealth to have a jury impanelled to try whether the coupons "are genuine, legal coupons, which are legally receivable for taxes, debts, and demands." The Commonwealth may be brought into court by service of a summons on the Commonwealth's attorney. Upon this petition an issue is framed and a trial by jury is to be had, with ample privileges to all parties of exception and appeal. If the suit is finally decided in favor of the taxpayer, he is to have the amount paid by him for the taxes refunded out of the first money in the treasury, in preference to all other claims.

It is somewhat difficult to see any substantial difference between the remedy given by these sections and that by sect. 4. There the form of the suit is *mandamus* begun while the coupons are in the hands of the taxpayer. After the suit has been begun the court requires a delivery of the coupons into its own possession, and the payment of the amount of the taxes into the treasury. This being done, the court sends the coupons to the appropriate tribunal for adjudication, and the proceedings thereafter are in all material respects like those provided for in the other sections. The judgment is also the same, except as to the merest matters of form. In both proceedings the object is to require the collector to accept the coupons as payment of the tax, and deliver back the money that has been deposited for the same purpose in case the coupons are not in law receivable. The petition for *mandamus*, filed in the Court of Appeals, under sect. 4, is the exact equivalent of the petition

to be filed in the other courts, under sects. 1, 2, and 3, to have the genuineness and the receivability of the coupons determined, and in both the real matter submitted for determination is, whether the taxpayer is entitled to have back the money he has deposited to pay his taxes in case his coupons ought to have been received.

Mandamus, in this class of cases, is in the nature of a suit to enforce the specific performance of a contract. But in the present case the performance sought is the payment of money, and the remedy substituted is equivalent to an action for its recovery, with ample provision for the satisfaction of any judgment that may be obtained; for it is made the ministerial duty of the treasurer to pay the amount of the recovery out of the first money in the treasury, and in preference to all other claims, as soon as the judgment is properly certified. The language of the act is, "shall refund the money before then paid for his taxes by the taxpayer out of the first money in the treasury in preference to all other claims." Clearly this is an appropriation by law of money in the treasury, within the meaning of art. 10, sect. 10, of the Constitution of Virginia, and the treasurer would be authorized to make the payment without further legislative action. It will be time enough to consider the effect of a repeal of this branch of the remedy when that shall be attempted.

The primary obligation of the State is for the payment of the coupons. All else is simply as a means to that end. It matters not whether the coupons have been refused for the taxes, if full payment of the amount they call for is actually made in money. A remedy, therefore, which is ample for the enforcement of the payment of the money is ample for all the purposes of the contract. That, we think, is given by the act of 1882 in both forms of proceeding.

Some objection is made to the first, second, and third sections because there is no provision for the recovery of costs. Without determining whether in point of fact costs can be recovered, it is sufficient to say that costs, *eo nomine*, were not recoverable at common law, and are usually regulated by statute. Certainly it would not be claimed that the change of an ordinary statute, which provided a remedy for the enforcement

of contracts, so as to prevent the recovery of costs when they had been given before, would impair the obligation of contracts between individuals that were affected by what was done, and we see no reason why one rule, in this particular, should be applied to individuals and another to the State.

In conclusion, we repeat that the question presented by this record is not whether the tax-collector is bound in law to receive the coupon, notwithstanding the legislation which, on its face, prohibits him from doing so, nor whether, if he refuses to take the coupon and proceeds with the collection of the tax by force, he can be made personally responsible in damages for what he does, but whether the obligation of the contract has been impaired by the changes which have been made in the remedies for its enforcement in case he refuses to accept the coupons. We decide only the question which is actually before us. It is no doubt true that the commercial value of the bonds and coupons has been impaired by the hostile legislation of the State; but this impairment, in our opinion, comes not from the change of the remedies, but from the refusal to accept the coupons without suit. What we are called upon to consider in this case is not the refusal to take the coupons, but the remedy after refusal.

We might have satisfied ourselves by a reference to the case of *Tennessee* v. *Sneed*, *ubi supra*, where the same general question was before us; but as we were asked to reconsider that case, we have done so with the same result, and, as we think, without in any manner departing from the long line of cases in which the principle involved has been recognized and applied.

Inasmuch as we are satisfied that a remedy is given by the act of 1882, substantially equivalent to that in force when the coupons were issued, we have not deemed it necessary to consider what would be the effect of a statute taking away all remedies.

Judgment affirmed.

MR. JUSTICE MATTHEWS. I concur in the judgment of the court, but prefer to rest the decision upon a ground different from that on which it is placed in its opinion.

I agree that the State of Virginia, by the act of 1871, entered into a valid contract with the holders of its bonds to receive their coupons in payment of taxes; and that any subsequent statute which denies this right is a breach of its contract and a violation of the Constitution of the United States.

But for a breach of its contract by a State no remedy is provided by the Constitution of the United States against the State itself; and a suit to compel the officers of a State to do the acts which constitute a performance of its contract by the State is a suit against the State itself.

If the State furnishes a remedy by process against itself or its officers, that process may be pursued because it has consented to submit itself to that extent to the jurisdiction of the courts; but if it chooses to withdraw its consent by a repeal of all remedies, it is restored to the immunity from suit, which belongs to it as a political community, responsible in that particular to no superior.

I adopt as decisive of the present case the language of the Chief Justice, in expressing the opinion of the court in *Louisiana* v. *Jumel*, *ante*, pp. 711, 728: "When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has, by its act of submission, allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State."

I do not, therefore, consider it necessary to enter upon the inquiry, whether the remedy provided by the State of Virginia, by the act of 1882, is effective and substantial compared with that which existed in 1871, when the bonds were issued. It is sufficient to say that it is the one which the State has chosen to give, and the only one, therefore, which the courts of the United States are authorized to administer.

MR. JUSTICE BRADLEY, MR. JUSTICE WOODS, and MR. JUSTICE GRAY concurred in the judgment upon both grounds: that stated in the opinion of the court as delivered by the Chief Justice, and that stated in the opinion of MR. JUSTICE MATTHEWS.

MR. JUSTICE FIELD and MR. JUSTICE HARLAN dissented.

MR. JUSTICE FIELD. I am not able to agree with the majority of the court in the judgment in this case, nor in the reasoning on which it is founded. The legislation of Virginia, which is sustained, appears to me to be in flagrant violation of the contract with her creditors under the act of March 30, 1871, commonly known as the Funding Act; and the doctrines advanced by the court, though not so intended, do, in fact, license any disregard of her obligations which the ill-advised policy of her legislators may suggest.

The plaintiff in error, the petitioner in the court below, is a citizen of Virginia and a resident of the city of Richmond. He owns property there, and on the 20th of March, 1882, was indebted to the State for taxes to the amount of three dollars and fifteen cents. At that time he was also the lawful holder of an overdue interest-coupon for three dollars, which had been cut from a bond of the State, issued under the provisions of the Funding Act. This coupon is in the following words: —

"The Commonwealth of Virginia will pay the bearer three dollars, interest due first January, 1882, on bond 6,498.

"GEORGE RYE,
"*Treasurer of the Commonwealth of Virginia.*

"Coupon No. 21."

And on its face it thus declares: —

"Receivable at and after maturity for all taxes, debts, and demands due the State."

The receivability of such coupons for State taxes, debts, and demands was, as will hereafter be shown, the principal consideration for the surrender of former bonds of the State and the acceptance of a less number in their place.

The petitioner, in payment of his taxes, tendered the coupon he held and fifteen cents in money to the treasurer of Richmond, who was charged by law with the duty of collecting taxes due to the State in that city; but he refused to receive them. Application was then made to the Supreme Court of Appeals to compel their receipt. The treasurer set up in his answer that he was ready to receive the coupon in payment of the taxes as soon as it was ascertained to be genuine and legally receivable. This answer was founded upon the provisions of the act of Jan. 14, 1882, entitled "An Act to prevent frauds upon the Commonwealth and the holders of her securities in the collection and disbursement of revenues." Upon the validity of its provisions the judges of the Court of Appeals were equally divided, and the application failed. The preamble of the act recites that bonds purporting to be those of the Commonwealth, issued under the act of March 30, 1871, are in existence without authority of law; that other bonds are in existence, which are spurious, stolen, or forged, bearing coupons in the similitude of those which are genuine and receivable for taxes, debts, and demands of the State; that coupons from such spurious, stolen, and forged bonds are received in payment of such taxes, debts, and demands; that coupons from genuine bonds, after having been thus received, are frequently reissued and received more than once in such payment; and that such frauds on the rights of the holders of the bonds impair the contract made by the Commonwealth with them, and, therefore, for the alleged purpose of protecting the rights of the bondholders, and of enforcing the contract between them and the State, the act declares that whenever any taxpayer or his agent shall tender to a collector any papers or instruments in print purporting to be coupons detached from bonds of the Commonwealth, issued under the act of 1871, to fund the public debt, the collector shall receive the same, and give the party tendering a receipt, stating that he has received them for the purpose of identification and verification; that he shall, at the same time, require such taxpayer to pay his taxes in coin, legal-tender notes, or national-bank bills, and if payment be refused, the taxes shall be collected as other delinquent taxes; that the collector shall mark each coupon thus received with

the initials of the taxpayer, and deliver them sealed up to the judge of the county court of the county or hustings court of the city in which the taxes are payable. It then provides that the taxpayer shall be at liberty to file his petition in said county court against the Commonwealth; that a summons to answer the same shall be served on the Commonwealth's attorney, who is to appear and defend the same; that in his petition the taxpayer must allege that he has tendered the coupons in payment of his taxes, and pray that a jury be impanelled "to try whether they are genuine legal coupons, which are legally receivable for taxes, debts, and demands." Upon this petition an issue is to be made on behalf of the Commonwealth, which is to be tried by a jury, and either party is to have a right to exceptions on the trial and to an appeal to the Circuit Court and ultimately to the Court of Appeals. If it be finally decided in favor of the petitioner that the coupons are "genuine, legal coupons, receivable for taxes, and so forth," then the judgment of the court is to be certified to the treasurer of the Commonwealth, who, upon receipt thereof, shall receive the coupons for taxes and refund to the taxpayer the amount before paid by him out of the first money in the treasury, in preference to other claims.

The act also provides that whenever any taxpayer applies to a court for a *mandamus* to compel a collector of taxes to receive coupons for them, it shall be the duty of the collector to return that he is ready to receive, in payment of the taxes, the coupons as soon as they have been legally ascertained to be genuine, and by law actually receivable; and that, upon such return being made, the court shall require the petitioner to pay his taxes to the collector of the city or county, or to the treasurer of the Commonwealth; and upon filing the receipt for the same, that the court shall direct the petitioner to file his coupons in court, which shall then forward the same to the county court of the county or hustings court of the city where the taxes are payable, and direct that court to frame an issue between the petitioner and the Commonwealth as to whether the coupons thus tendered are genuine and legally receivable for taxes. On the trial either party is to be entitled to exceptions, and to an appeal to the Circuit Court and to the Supreme

Court of Appeals. If the decision be finally in favor of the petitioner, he is to be entitled to a *mandamus* that the coupon be received for taxes; but inasmuch as those taxes have already been paid, they are to be refunded by the treasurer of the Commonwealth out of the first money in the treasury, in preference to all other claims. A subsequent act, passed on the 7th of April, 1882, amending a section of the Code of Virginia of 1873, prohibits the Supreme Court of Appeals from issuing the writ of *mandamus* or any other summary process to compel the collecting officers of the State to receive anything in payment of taxes other than gold or silver, treasury notes of the United States, or bills of the national banks.

The question for decision here is as to the constitutionality of the act of Jan. 14, 1882, which destroys the receivability of the coupon for taxes, allows a suit for the recovery of its amount only after they have been paid, and authorizes a recovery only when the jury have found that it is genuine and legally receivable for them, and of the act of April 7, 1882, which withdraws from the Supreme Court of Appeals the power to compel the receivability of the coupon for taxes. In other words, Do these acts impair the obligation of the contract upon which the coupons were originally issued?

A brief reference to the history of the Funding Act of 1871 will serve to place this subject in a clear light. Prior to the late war Virginia constructed various public works, and to enable her to do so she borrowed large sums of money, for which she issued her bonds, exceeding in amount thirty millions of dollars. The interest on them was regularly paid up to the breaking out of the war. Afterwards its payments ceased, and until 1871, with the exception of some small sums remitted to London for foreign bondholders or paid in Virginia in Confederate money, and a small amount in 1866 and 1867, no part of the interest or principal was ever paid. In 1871, the principal of her debt, with its unpaid and overdue interest, amounted to over forty-five millions of dollars.

During the war the people of a portion of her territory separated from her, and formed a new State, by the name of West Virginia, which was admitted by Congress into the Union. Nearly one-third of the territory of Virginia and one-third of

her people were thus withdrawn from her original limits and jurisdiction. Her then indebtedness was justly chargeable against her and the new State in some ratable proportion. The money raised by her bonds had been expended in improvements throughout her entire territory. All portions of it had participated in the benefits conferred by the expenditure of the moneys. It was but just, therefore, that the new State should assume and pay an equitable proportion of the debt. It is a well-settled doctrine of public law that, upon a division of a State into two or more States, her debts shall be ratably apportioned among them. See authorities upon this subject in *Hartman* v. *Greenhow*, 102 U. S. 672, 677.

In conformity with this doctrine, West Virginia, in her first Constitution, adopted in 1863, recognized her liability in this respect, and declared that "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January in the year 1861 shall be assumed by this State, and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years." Constitution of 1863, art. 8, sect. 8. She, however, did nothing, up to 1871, to give effect to this unequivocal and solemn recognition of her liability, or to her positive injunction that the legislature should, as soon as practicable, ascertain the same and provide for its liquidation; and she has done nothing since.

The Commonwealth of Virginia, nevertheless, undertook in that year to effect a settlement with her creditors, taking as a basis that inasmuch as one-third of her former territory and population was embraced in the new State, the latter should assume one-third of the debt, and the Commonwealth should settle for the remainder. Accordingly, her legislature on the 30th of March, 1871, passed the Funding Act. It is entitled "An Act to provide for the funding and payment of the public debt." Its preamble recites that, in the ordinance authorizing the creation of the State of West Virginia, it was provided that she should take upon herself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, and that this provision has not been

fulfilled, although repeated and earnest efforts in that behalf have been made by Virginia, and that the people of the Commonwealth are anxious for the prompt liquidation of her proportion of the debt, estimated at two-thirds of the same; and then declares that to enable the State of West Virginia to settle her proportion of said debt with the holders thereof, and to prevent any complications or difficulties which may be interposed to any other manner of settlement, and for the purpose of promptly restoring the credit of Virginia, by providing for the prompt and certain payment of the interest upon the just proportion of her debt as the same should become due, the legislature enacts that the owners of the bonds, stocks, or interest certificates of the State, with some exceptions, may fund two-thirds of the amount of the same, together with two-thirds of the interest due, or to become due, thereon, up to July 1, 1871, in six per cent coupon or registered bonds of the State having thirty-four years to run, but redeemable at the pleasure of the State after ten years, the bonds to be made payable to order or bearer, and the coupons to bearer. The act declares that the coupons shall be payable semi-annually, and "be receivable at and after maturity for all taxes, dues, and demands due the State," which shall be so expressed on their face, and that the bonds shall bear on their face a declaration to the effect that their redemption is secured by a sinking fund, provided for by the law under which they were issued. For the remaining one-third of the amount of the bonds thus funded the act provides that certificates shall be issued to the creditors, setting forth the amount, with the interest thereon, and that their payment shall be provided for in accordance with such settlement as may subsequently be made between the two States, and that Virginia will hold the bonds surrendered, so far as they are not funded, in trust for the holder or his assignees.

This act induced a large number of creditors to surrender their bonds, and take new bonds, with interest coupons annexed, for two-thirds of their amount and certificates for the balance. The number of bonds surrendered amounted to about thirty millions of dollars, for which new bonds to the amount of twenty millions were issued. A contract was thus executed

between the State and the holders of the new coupons which the State could not afterwards impair. As this court, with only one dissenting member, said in *Hartman* v. *Greenhow* with respect to this contract: "She thus bound herself not only to pay the bonds when they became due, but to receive the interest coupons from the bearer at and after their maturity, to their full amount, for any taxes or dues by him to the State. This receivability of the coupons for such taxes and dues was written on their face, and accompanied them into whatever hands they passed. It constituted their chief value, and was the main consideration offered to the holders of the old bonds to surrender them and accept new bonds for two-thirds of their amount." 102 U. S. 672, 679.

The Supreme Court of Appeals of Virginia had previously spoken, with respect to this contract, with equal clearness. Notwithstanding the language of the act of March 30, 1871, declaring that the interest coupons of the new bonds shall be "receivable at and after maturity for all taxes, debts, dues, and demands due the State," and this is expressed upon their face, the legislature of Virginia, within less than a year afterwards, on March 7, 1872, passed an act declaring that it shall not be lawful for any officers charged with the collection of taxes or other demands of the State then due, or to become due, "to receive in payment thereof anything else than gold or silver coin, United States treasury notes, or notes of the national banks." As this act was in direct conflict with that of March 30, 1871, its validity was assailed, and came before the Court of Appeals, in *Antoni* v. *Wright*, at the November Term, 1872. 22 Gratt. (Va.) 833. In an opinion of great ability and learning, the character and effect of the Funding Act were elaborately considered; and it was held that its provisions constituted a contract founded upon valuable considerations and binding upon the State. By the decision of the State court in that case, and of this court in *Hartman* v. *Greenhow*, the receivability of the coupons for taxes and demands of the State was held to be an essential part of the contract on which the bonds were received, and to constitute the chief value of the coupon and the principal inducement offered for the surrender of the old bonds and the acceptance of two-thirds of their amount. When the legis-

lature subsequently attempted to annul this receivability, and required coin or currency to be received for taxes, the Court of Appeals held that such interference with the receivability of the coupons impaired the obligation of the contract and was void. When again the legislature attempted to impair that receivability, by requiring the tax on the bond to which it originally belonged to be first deducted from the amount of the coupon before it could be received for other taxes, this court held that the legislation impaired the obligation of the contract. But now, strange to say, a law is sustained, as not impairing the obligation of the contract, although it prohibits the receivability of the coupons for State taxes, dues, and demands, and requires the holder to pay them in coin, treasury notes, or bills of the national banks, and, in return, gives him the privilege only, upon surrendering it, to test its genuineness and its receivability for taxes by instituting a suit, in which a jury is to be summoned, and any decision obtained may be taken to the Circuit Court and to the Court of Appeals. If final judgment shall be obtained that the coupon is genuine and legally receivable for taxes, the court is required to certify it to the treasurer of the Commonwealth, who shall then receive the coupon for taxes, that is to say, long after they are paid, and refund its amount out of the first money in the treasury, in preference to other claims. If there be no money in the treasury not otherwise appropriated, he may have to wait an indefinite period until the treasury is replenished. Not only does this act entail prolonged delay and expense in every case, but, in a majority of cases, the expense would exceed the amount of the coupon. Where only a few hundred dollars in bonds are held, the amount of the coupons would not justify the expenditure. Coupons for small amounts are thus rendered practically of no value. Their receivability for taxes, dues, and demands of the State is effectually destroyed.

Under the act of Jan. 14, 1882, there is no equivalent given to the creditor for the receivability of the coupon for taxes. The right to enforce on demand payment of a particular claim essentially differs, both in availability and value, from a right to reduce the claim to judgment after protracted litigation, and particularly when, even after judgment, a further delay is

necessary to wait until there are funds in the treasury of the State to pay it.

It would excite surprise in any commercial community if a bank, whose bills purport on their face to be payable on demand, should declare that inasmuch as there were some forged notes upon it in circulation, therefore it would pay only such as the holder should judicially establish to be genuine. It has been decided that any unnecessary delay by a bank in examining its bills to determine their genuineness is equivalent to a refusal to redeem them. A bank resorting to such a flimsy pretext to evade payment would at once be pronounced insolvent, and be put into the hands of a receiver.

No weight is to be given to the recitals in the preamble of the act of Jan. 14, 1882, as to outstanding forged bonds and coupons. In the first place, the State, by reciting that various frauds have been committed with respect to some of her securities, cannot legislate to impair the obligation of her contracts. In the second place, we are justified in considering that these recitals are without foundation in fact. According to the established doctrine of this country, the most which can be attributed to a recital of facts in the preamble of an act is, that it was represented to the legislature that they existed. It is not the province of the legislature to find facts which shall affect the rights of others; that is the province of the judiciary. Says Cooley: "A recital of facts in the preamble of a statute may, perhaps, be evidence when it relates to matters of a public nature, as that riots or disorders exist in a certain part of the country; but when the facts concern the rights of individuals, the legislature cannot adjudicate upon them." Constitutional Limitations, 96.

Says the Court of Appeals of Kentucky: "The legislature, in all its inquiring forms, by committees, makes no issue, and in their discretion may or may not coerce the attendance of witnesses, or the production of records, and are frequently not bound by those rules of evidence applicable to an issue properly formed, the trial of which is an exercise of judicial power. Once adopt the principle that such facts are conclusive, or even *prima facie* evidence against private rights, and many individual controversies may be prejudged, and drawn from the

functions of the judiciary into the vortex of legislative usurpation. The appropriate functions of the legislature are to make laws to operate on future incidents, and not the decision of or forestalling rights accrued or vested under previous laws." *Elmendorff* v. *Carmichael*, 3 Litt. 473, 480. In the case from which this citation is made two acts were under consideration; the recital in the preamble of one was that a certain person was a naturalized citizen; the recital in the preamble of the other was of a letter of attorney and a conveyance by a third party; and the court said: "Such a preamble is evidence that the facts were so represented to the legislature, and not that they are really true." Although the language cited was used with reference to the preamble of a private statute, Sedgwick, in his Treatise on the Interpretation and Construction of Statutory and Constitutional Law, after quoting it, says: "This reasoning applies with as much force to public as to private statutes; and the Supreme Court of New York has well said that the legislature has no jurisdiction to determine facts touching the rights of individuals."

The weight usually accorded to a recital of matters of fact in the preamble of an act, that the facts were so represented to the legislature, cannot be allowed here; for the journals of the legislature of Virginia show that it had information when the act was passed, that the very opposite of the recitals was true, — that there were no forged or counterfeit bonds or coupons in existence, as therein stated. The journals may be referred to in order to show what was brought to the attention of the legislature, and those journals show that in 1880 the House of Delegates of Virginia appointed a committee to examine the office of the second auditor, who is the custodian of all papers relating to the debt of the State, to ascertain whether there were any forged or counterfeit bonds or coupons among them; and the committee reported that they were unable to find a single forged or counterfeit bond or coupon; and of the millions of dollars in coupons which had been paid into the treasury since 1871 all were accounted for, except coupons to the amount of $28,197. As it was the duty of the officer on receiving the coupons to cancel them, it must be presumed that these were properly cancelled by him at the time.

Again, in answer to a resolution of the House of Delegates, dated Jan. 9, 1882, the second auditor reported that no counterfeit or forged obligations, bonds, coupons, or certificates of the State had in any way come to his knowledge. And in answer to a resolution of the Senate of the 16th of January, 1882, the same auditor replied that he had no knowledge of any spurious or forged bonds or coupons issued or purporting to be issued under the Funding Act of March 30, 1871; and in an examination had into the matter, a clerk in the second auditor's office testified that he was familiar with the coupons issued under the act of March 30, 1871, and had handled about seven millions of them, and had never seen or heard of a counterfeit coupon. Another witness connected with the treasurer's office stated that he was familiar with the conduct and management of both the second auditor's office and of the treasurer's office, and that he had never heard of a duplicate or forged coupon.

In the third place, assuming that the $28,197 in coupons which could not be found in the auditor's office or accounted for had not been cancelled, but had been mislaid, lost, or stolen, the holders of other coupons ought not to be deprived of their use because the officers of the auditor's department had been neglectful of their duties. Assuming, also, against the fact, that there were forged and spurious coupons of the State, their existence did not warrant a rejection of such as are genuine. Although no officer questions their genuineness when tendered, the holder of them must make up an issue with the State to try the fact before a jury. The act was evidently designed to accomplish much more than the protection of the holders of genuine coupons. As justly said by one of the judges of the Court of Appeals: "Whilst its professed object in its title is to prevent frauds upon the Commonwealth and the holders of its securities, it greatly depreciates the value of those securities, and thereby impairs the obligation of contracts, under the vain pretext that it is necessary to protect the Commonwealth against frauds. It not only destroys or renders almost valueless the coupon, but also the coupon bonds, amounting to millions of dollars, issued by the State by authority of the act of March 30, 1871, and whose value depends upon the prompt payment of interest, of which assurance was given by the State to the

holders of those bonds by the stipulation in the contract that the coupons at and after maturity should be receivable for all taxes, debts, &c., due the State. This statute prohibits revenue officers to receive any coupons, though unquestionably genuine, when tendered for and in discharge of taxes, &c., due the State, and requires the bearer of the coupon so tendered to pay his taxes in coin or other currency, which I think is plainly a repudiation or annulment of the State's contract."

The clause of the Constitution which declares that no State shall pass any law impairing the obligation of contracts prohibits legislation thus affecting contracts between the State and individuals equally as it does contracts between individuals. Indeed, the greater number of cases in which the protection of the constitutional provision has been invoked against subsequent legislative impairment of contracts has been of those in which the State was one of the contracting parties. Where a State enters the markets of the world and becomes a borrower, she lays aside her sovereignty and takes upon herself the position of an ordinary civil corporation, or of an individual, and is bound accordingly. *Davis* v. *Gray*, 16 Wall. 203; *Murray* v. *Charleston*, 96 U. S. 432; *Hall* v. *Wisconsin*, 103 id. 5.

What, then, was the obligation of the contract entered into between Virginia and her creditors under the Funding Act of 1871, so far as the interest coupons are concerned? The contract is that she will pay the amount of the coupon, and that it shall, at and after maturity, be receivable for taxes, dues, and demands of the State. And by its receivability is meant that it is to be taken by officers whom the State may authorize to receive money for its dues whenever tendered for them. By the obligation of a contract is meant the means which the law affords for its execution, the means by which it could, at the time it was made, be enforced. As said by the court in *McCracken* v. *Hayward*, "The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts and form a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other." 2 How. 608, 612.

To the same purport and still more emphatic is the language

of the court in *Walker* v. *Whitehead*, 16 Wall. 314, 317: "The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge, and enforcement. Nothing is more material to the obligation of a contract, than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment."

In other words, to quote the language of Professor Pomeroy in his work on Constitutional Law, "A party may demand that substantially the same remedial right appropriate to his contract when it was entered into shall be accorded to him when it is broken." "Under our system of jurisprudence," says the same writer, "two forms of remedial right may result to the injured party upon the breach of a contract; the one form applying to a small number only of agreements, the other being appropriate to all. The first is the right to have done exactly what the defaulting party promised to do, — the remedial right to a specific performance. The other is compensatory, or the right to be paid such an amount of pecuniary damages as shall be a compensation for the injury caused by the failure of the defaulting party to do exactly what he promised to do. Both of these species of remedial rights must be pursued by the aid of the courts. In both the existence of the contract and of the breach must be established. These facts having been sufficiently ascertained, a decree or judicial order must be rendered, in the first case, that the defaulting party do exactly what he undertook to do, and in the second case, that the defaulting party pay the sum of money fixed as a compensation for his delict." Sects. 611, 612.

The receivability of the coupon, under the Funding Act of 1871, for taxes, dues, and demands, gave to it, as already said, its principal value. At that time there was provided in the system of procedure of the State a remedy for the specific execution of the contract, by which this receivability could be enforced. The legislation of Jan. 14 and April 7, 1882, deprives the holder of the coupon of this remedy, and in lieu of it gives him the barren privilege, after paying the taxes, of suing

in a local court to test before a jury the genuineness of the coupon and its legal receivability for them; and in case he establishes these facts, of having a judgment to that effect certified to the treasurer of the Commonwealth, and the amount paid refunded out of money in the treasury, if there be any. To recover this judgment he must pay the costs of the proceeding, including the fees of witnesses and jurors, and of the clerk, sheriff, and other officers of the court. This is a most palpable and flagrant impairment of the obligation of the contract. No legislation more destructive of all value to the contract is conceivable, unless it should absolutely and in terms repudiate the coupon as a contract at all. It is practical repudiation.

In *Bronson* v. *Kinzie* this court, speaking by Chief Justice Taney, said: "It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of a contract, and the rights of a party under it, may in effect be destroyed by denying a remedy altogether, or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law, declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or incumbered it with conditions that rendered it useless or impracticable to pursue it." 1 How. 311, 317.

In *Planters' Bank* v. *Sharp* this court said: "One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force." 6 id. 301, 327.

In *Murray* v. *Charleston* the court cited with approval the language of a previous decision to the effect that a law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, impairs its obligation; and added, speaking by Mr. Justice Strong, who recently occupied a seat on this bench, that "it is one of the highest duties of

this court to take care the prohibition [against the impairment of contracts] shall neither be evaded nor frittered away. Complete effect must be given to it in all its spirit." 96 U. S. 432, 448.

In *Edwards* v. *Kearzey* this court said, speaking by Mr. Justice Swayne, so lately one of our number: "The remedy subsisting in a State when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void." 96 U. S. 595, 607. Mr. Justice Clifford, also lately sitting with us, in a concurring opinion in the same case, said: "When an appropriate remedy exists for the enforcement of the contract at the time it was made, the State legislature cannot deprive the party of such a remedy, nor can the legislature append to the right such restrictions or conditions as to render its exercise ineffectual or unavailing." Id. 608.

And only two terms ago, in *Louisiana* v. *New Orleans*, this court said, without a dissenting voice, that "the obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced, by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened." 102 id. 203, 206.

How can it be maintained, in the face of these decisions, that the legislation of Jan. 14 and April 7, 1882, does not impair the obligation of the contract under the Funding Act? It annuls the present receivability of the coupon; it substitutes for the specific execution of the contract a protracted litigation; and when the genuineness of the coupon and its legal receivability for taxes are judicially established, its payment is made dependent upon the existence of money in the treasury of the State. If the language of the act, declaring that, when the genuineness of the coupon and its receivability for taxes are established, the taxes paid by its holder shall be refunded out of the first money in the treasury in preference to other claims, be deemed a sufficient appropriation to authorize the treasurer

to pay out the money, contrary to what has just been decided with respect to language much more expressive in the legislation of Louisiana, of what avail can it be to the owner of the coupon if the treasurer refuse to refund the amount? There is no mode, according to the opinion of the majority, of coercing his action. No *mandamus* can issue, for that remedy and all compulsory process have been abolished.

Besides all this, as the coupons are mostly for small amounts, the costs of the suits to test their genuineness and receivability for taxes would be more than their value. Practically, the law destroys the coupons, and it was evidently intended to have that effect.

There is nothing at all similar to this, as seems to be intimated by the opinion of the majority, in the revenue system of the United States which forbids judicial proceedings to restrain the collection of a tax for its alleged invalidity, and only authorizes suit to recover back the money if paid under protest. Here the validity of the tax of Virginia is not assailed. The only question is, shall the officer of the State be required to receive in payment of the tax what she by her contract declared he should receive.

Tennessee v. *Sneed*, 96 U. S. 69, is cited as giving support to the decision in this case. I do not think that it gives it any support whatever. It does not sustain the doctrine that a State may abolish the right of *mandamus* to which a creditor at the time of the contract was entitled, as a mode of specifically enforcing it. The facts of the case are these: In 1838 the legislature of Tennessee passed a law, with respect to the bills and notes of the Bank of Tennessee, declaring that "the bills and notes of the said corporation, originally made payable, or which shall have become payable on demand in gold or silver coin, shall be receivable at the treasury, and by all tax-collectors and other public officers, in all payments for taxes or other moneys due the State."

The Supreme Court of the State decided that a proceeding by *mandamus* against an officer of the State to enforce the receipt of these bills for taxes was virtually a suit against the State, and could not be maintained prior to 1855, when an act was passed allowing suits to be brought against the State under

the same rules and regulations that govern actions between private parties. In 1865 this act was repealed. The creditor, when the contract was made, acquired, therefore, no right to the writ of *mandamus*, for it was not then an existing remedy; and so Mr. Justice Hunt, in delivering the opinion of the court, said: "The question discussed by Mr. Justice Swayne in *Walker* v. *Whitehead*, 16 Wall. 314, of the preservation of the laws in existence at the time of the making of the contract, is not before us. The claim is of a subsequent injury to the contract." And the court, after referring to the numerous cases of a change of remedies, says: "The rule seems to be that in modes of proceeding and of forms to enforce the contract, the legislature has the control, and may enlarge, limit, or alter them, provided that it does not deny a remedy, or so embarrass it with restrictions and conditions as seriously to impair the value of the right."

Here the original remedy possessed by the coupon-holder is abolished, and that which is given as a substitute is so embarrassed with conditions as to destroy the value of the contract.

In *Louisiana* v. *Pilsbury*, which was before us at the last term, the legislature of that State had passed a law prohibiting its courts from issuing a *mandamus* to compel the levy of a tax for the payment of bonds other than those issued under what was known as the premium-bond plan, thus cutting off the means of enforcing certain bonds held by the relator; and this court unanimously held that "the inhibition upon the courts of the State to issue a *mandamus* for the levy of a tax for the payment of interest or principal of any bonds except those issued under the premium-bond plan was a clear impairment of the means for the enforcement of the contract with the holders of the consolidated bonds. When the contract was made, the writ was the usual and the only effective means to compel the city authorities to do their duty in the premises, in case of their failure to provide in other ways the required funds. There was no other complete and adequate remedy. The only ground on which a change of remedy existing when a contract was made is permissible without impairment of the contract is, that a new and adequate and efficacious remedy be substituted for that which is superseded." 105 U. S. 278, 301.

That there is any adequate and efficacious remedy substituted for the one in existence when the Funding Act was adopted, cannot, it seems to me, be seriously affirmed. The remedy originally existing was effective. No officer could refuse to receive the coupon without subjecting himself to personal liability. After a tender no valid sale could be made for the taxes. And the creditor could invoke the compulsory process of the courts to secure a specific performance. Now all is changed. A law which practically destroys the value of the coupon is sustained. The officer is not bound to receive it, in the sense that he cannot be compelled to take it. He can enforce the payment of taxes in money; he can sell property, if necessary, to collect them; he can wholly ignore the coupon, unless the holder should foolishly consent to incur double the amount in costs to establish by a jury trial its genuineness and legal receivability for taxes.

I find myself bewildered by the opinion of the majority of the court. I confess that I cannot comprehend it, so foreign does it appear to be from what I have heretofore supposed to be established and settled law. And I fear that it will be appealed to as an excuse, if not justification, for legislation amounting practically to the repudiation of the obligations of States, and of their subordinate municipalities, — their cities and counties. It will only be necessary to insert in their statutes a false recital of the existence of forged and spurious bonds and coupons, — as a plausible pretext for such legislation, — and their schemes of plunder will be accomplished. No greater calamity could, in my judgment, befall the country than the general adoption of the doctrine that it is not a constitutional impairment of the obligation of contracts, to embarrass their enforcement with onerous and destructive conditions, and thus to evade the performance of them.

I am of opinion that the judgment of the Court of Appeals of Virginia should be reversed, and the cause remanded with instructions to award the *mandamus* prayed.

MR. JUSTICE HARLAN. I understand my brethren of the majority, in the opinion read by the Chief Justice, to declare:

That the bonds and coupons issued by Virginia, under the

Funding Act of March 30, 1871, constitute contracts within the meaning of that clause of the Federal Constitution which forbids a State from passing any law impairing the obligation of contracts;

That the holder of a coupon, so issued, against whom State taxes are assessed, is entitled under his contract to have it applied in payment of them, when it is offered for that purpose;

That the act of Jan. 14, 1882, in so far as it prevents the tax-collector from receiving it, when so offered, for any purposes except that of identification and verification, is in conflict with the Federal Constitution, and, therefore, void;

That, as a general rule, the laws applicable to the case, in force at the time and place of making a contract, including those which affect its validity, construction, discharge, and *enforcement*, enter into and form a part of the contract itself; and that while the State may alter or change existing remedies, it may not make such alterations and changes in the forms of action or the modes of proceeding as will impair substantial rights, or leave the party without an adequate and efficacious remedy for their enforcement;

I understand them, also, to reaffirm *Bronson* v. *Kinzie*, 1 How. 311, where, among other things, this court, speaking by Chief Justice Taney, said: "It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy, and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or incumbered it with conditions that rendered it useless or impracticable to pursue it." p. 317.

I do not understand the court to throw any doubt upon, or in any degree to qualify the decision in, *State of New Jer-*

sey v. *Wilson*, 7 Cranch, 164, 166, where it is declared that the contract clause of the Constitution "extends to contracts to which a State is a party, as well as to contracts between individuals;" or in *Providence Bank* v. *Billings*, 4 Pet. 514, 560, where this court, speaking by Chief Justice Marshall, said that it had "been settled that a contract entered into between a State and an individual is as fully protected by the tenth section of the first article of the Constitution, as a contract between two individuals;" or in *Green* v. *Biddle*, 8 Wheat. 1, 84, where it was said, through Mr. Justice Washington, "that the Constitution of the United States embraces all contracts, executed or executory, whether between individuals, or between a State and individuals; and that a State has no more power to impair an obligation into which she herself has entered than she can the contracts of individuals;" or in *Woodruff* v. *Trapnall*, 10 How. 190, 207, where, speaking by Mr. Justice McLean, the court declared that "a State can no more impair, by legislation, the obligation of its own contracts, than it can impair the obligation of the contracts of individuals;" or in *Wolff* v. *New Orleans*, 103 U. S. 358, 367, where, speaking by Mr. Justice Field, this court unanimously held "that the prohibition of the Constitution against the passage of laws impairing the obligation of contracts applies to the contracts of States, and to those of its agents under its authority, as well as to contracts between individuals."

These propositions meet my hearty approval, as well because they rest upon a sound interpretation of the Constitution, as because they have been long established by the decisions of this court. But the difficulty I have is to reconcile the judgment in this case with these admitted propositions, and, therefore, I am, with my brother Field, constrained to dissent from so much of the opinion as maintains that the remedy provided by the act of Jan. 14, 1882, is adequate and efficacious for the protection and enforcement of the rights of the holders of the bonds and coupons, and substantially equivalent to that given when they were issued. On the contrary, the act, especially as subsequently modified, is, I take leave to say, a palpable and flagrant impairment of the obligation of the contract of Virginia, and, consequently, is unconstitutional and void. If it be

upheld in its application to the bonds and coupons issued under the Funding Act, it is difficult to perceive that the contract clause of the Constitution is of the slightest practical value for the preservation of the rights of parties dealing with a State. Indeed, the act, in its necessary operation, as directly and effectually impairs the commercial value of the bonds and the taxpaying power of the coupons thereunto annexed, as would a statute which in terms repudiated them, and forbade the receipt of the coupons, under any circumstances, for taxes or demands due to the Commonwealth.

What were the rights of the bondholder under the funding act, and other laws of Virginia in force when it was passed? This inquiry is fundamental, since those rights are entitled to judicial protection, either by the remedies existing when they accrued, or by such, if any, subsequently given, as may be adequate and efficacious to that end. Under the contract, Antoni was entitled, as all agree, to have his coupon received, when offered, in payment of his taxes. If, when so offered, it was refused, those laws provided him with the remedy of a *mandamus* from the Supreme Court of Appeals to compel the collector to accept it and cancel the taxes. This is conceded by my brethren of the majority, and no one claims that there was then any other remedy for the direct enforcement of the contract. And that remedy, it cannot be denied, was of value, since the taxes, until paid, constituted an incumbrance upon the taxpayer's property which he could not prudently overlook, and which he was entitled to have removed. It should be observed, in this connection, that section 2 of article 4 of the Constitution of Virginia, adopted in 1870, gave in express terms original jurisdiction to that court in cases of *mandamus*. Such were his contract rights under the act of 1871, and such was the remedy then given for their enforcement.

I proceed to inquire whether those rights have been impaired by the act of Jan. 14, 1882. The first section declares that the officer to whom coupons, issued under the act of 1871, are tendered in payment of taxes, debts, or demands due the State, "shall receive the same for the purpose of identification and verification." The second section provides that he shall, at the same time, require the taxpayer to pay his taxes

in coin, legal-tender notes, or national-bank bills, and, upon such payment, give him a receipt for the same; and, in case of a refusal so to pay, the officer is directed to collect the taxes as all other delinquent taxes are collected, that is, by levy and distraint.

It may be observed here that when the taxpayer elects to stand upon the terms of his contract, and refuses to pay his taxes in coin, legal-tender notes, or bank-bills, the act, curiously enough, does not direct the officer to return the coupons so tendered, but requires him to deliver them to the judge of the county court of the county or the hustings court of the city in which such taxes, debts, or demands are payable. Thereupon the taxpayer is "at liberty to file his petition in said county court against the Commonwealth," and have a jury impanelled to try whether the coupons are "genuine, legal coupons, which are legally receivable for taxes, debts, and demands," with right of appeal by either party to the Circuit Court and the Court of Appeals. "If it be finally decided in favor of the petitioner that the coupons tendered by him are genuine, legal coupons, which are legally receivable for taxes, and so forth, then the judgment of the court shall be certified to the treasurer, who, upon the receipt thereof, shall receive said coupons for taxes, and shall refund the money, before then paid for his taxes by the taxpayer, out of the first money in the treasury, in preference to all other claims."

The alteration made by the act of Jan. 14, 1882, of the remedy by *mandamus* is this: If a *mandamus* is applied for to any court of the Commonwealth, the collector shall make return "that he is ready to receive said coupons in payment of such taxes, debts, and demands as soon as they have been legally ascertained to be genuine, and the coupons which, by law, are actually receivable." Upon such return, the court shall require the taxpayer to pay his taxes to the proper officer, which being done, the taxpayer must file his coupons in court, which is directed to forward them to the county court of the county or the hustings court of the city where the taxes are payable, when an issue is framed, upon the trial of which the officer representing the State must require proof of the genuineness and legality of the coupons tendered. A

right of appeal is given to the Circuit Court and the Supreme Court of Appeals. If the petitioner finally succeeds, then the court is required to issue a *mandamus* for the receipt of the coupons for the taxes assessed. Thereupon the treasurer of the Commonwealth must refund to the taxpayer the amount theretofore paid by him out of any money in the treasury, in preference to all other claims. The Act of April 7, 1882, provides that no writ of *mandamus* shall issue from the Supreme Court of Appeals "in any case of the collection or attempt to collect revenue, or compel the collecting officers to receive anything in payment of taxes other than as provided in chap. 41, Acts of Assembly, approved January 26, 1882, or in any case arising out of the collection of revenue in which the applicant for the writ of process has any other remedy adequate for the protection and enforcement of his individual right, claim, and demand, if just."

This court waives any determination of the question whether the act of April 7, 1882, repeals so much of that of Jan. 14, 1882, as relates to *mandamus*. But, referring to the remedy given by the first, second, and third sections of the latter act, it holds that there is no substantial difference between the remedy given by those sections and the remedy given by *mandamus* in the same act; further, — which is vital in this case, — that the obligation of the contract is not impaired by the changes made, by the act of Jan. 14, 1882, in the remedies for its enforcement, in case the collector refuses to accept in payment of taxes coupons, when offered for that purpose.

Here is the radical difference between the majority of my brethren and myself. To my mind, — I say it with all respect for them, — it is so entirely clear that the change in the remedies has impaired both the obligation and the value of the contract, that I almost despair of making it clearer by argument or illustration.

It is conceded that under the contract the taxpayer is entitled to have his coupon received for his taxes when tendered, while under the act of Jan. 14, 1882, the collector is forbidden to so receive it; and the taxpayer, in order to protect his property against levy or distraint, and relieve it from the incumbrance created by the assessment of taxes, must pay

them in money, and then, if he wishes to get it back, prove to the satisfaction of twelve jurymen the genuineness and legal receivability of his coupons.

Under the contract and the laws in force when it was made, the taxpayer is entitled, in the first instance, to enforce the receipt of his coupons for taxes by *mandamus*, the sole remedy then given to effect that result; while under the subsequent legislation he is denied the right to that writ until he first pays his taxes in money, and then proves to the satisfaction of twelve jurymen that they are genuine coupons, and legally receivable for taxes.

Under the contract and the laws in force when it was made, the collector was not bound to resist an application for a *mandamus*, and it is not to be presumed that he would do so unless he doubted the genuineness of the coupon tendered in payment of taxes. If, however, he did so, he became liable to pay costs when the taxpayer succeeded; while under the act of Jan. 14, 1882, all discretion is taken from the collector, and, without liability to pay costs in any contingency, he is required, although he may know the coupon to be genuine and legally receivable for taxes, to decline receiving it until the taxpayer, having first paid his taxes in money, shall, to the satisfaction of twelve jurymen, prove it to be genuine.

Let me further illustrate some of these propositions. Suppose the taxpayer holds a bond for $100 issued under the act of 1871. It has thirty-four years to run, and the interest, payable semi-annually for the whole period at the rate of six per cent per annum, is evidenced by sixty-eight coupons of three dollars each. Under the laws in force when the contract was made, — a *mandamus* to compel the receipt of the first coupon, having established its genuineness and its receivability for taxes, — the collector and the Commonwealth would be estopped from raising any such question as to the remaining coupons attached to the same bond. But under the act of Jan. 14, 1882, the collector is required, as to all coupons presented, although known to be genuine, to collect money for the taxes for which they are tendered; and that money is paid into the treasury of the Commonwealth, not to be returned unless the taxpayer, upon every presentation of coupons for taxes, goes through

the jury trial prescribed by that act, obtains a verdict establishing their genuineness and legal receivability for taxes, and, in the event of an appeal, secures an affirmance of the judgment in his favor. The verdict and judgment as to one coupon do not, under that act, establish the genuineness of other coupons of the same bond. Thus it is demonstrably clear that the taxpayer, before he can enforce the receipt of the entire sixty-eight coupons of one bond for $100, may be required to have at least as many jury trials, covering precisely the same issues, as there may be occasions to use coupons in payment of taxes. Certainly the taxpayer, if not an attorney, cannot safely go before the jury without an attorney to represent him. It is, therefore, almost absolutely certain that his attorney's fee and the costs for each jury trial will be several times greater than the amount of the coupons involved. The result, then, is that he will lose more by presenting his coupons in payment of his taxes than by making an absolute gift of them to the Commonwealth.

And the remedy thus given by the statutes, passed after the contract was made, for the enforcement of the taxpayer's admitted right to have his coupon received for taxes, when offered, is pronounced to be adequate and efficacious, and not an impairment of the substantial rights given by the contract. My brethren, — distinctly admitting that the legislation of 1882 is in hostility to the State's creditors, and has impaired the commercial value both of the bonds and their coupons, — in effect and by a refinement of reasoning which I am unable to comprehend, hold, that such legislation does not burden the proceedings for the enforcement of the contract with any new conditions or restrictions inconsistent with or impairing its obligation. I cannot assent to such conclusion, believing, as I do, not only that it is in direct conflict with every adjudged case cited, either by the court or by my brother Field, but that the new remedy is adequate and efficacious, not for the preservation and enforcement, but for the destruction, of the contract. The holders of the bonds and coupons are placed by the legislation of 1882 in a position where it is useless and impracticable to pursue the remedies thereby given. To my mind this is so perfectly apparent that I should have deemed it impossible that

any different view could be entertained. It should be remembered that the court places its decision upon the ground that the change in the remedy has not, in legal effect, impaired the obligation of the contract, and not upon the ground that this suit is, within the meaning of the Federal Constitution, a suit against the State. Nor could it be placed upon the latter ground without overturning the settled doctrines of this court. *Davis* v. *Gray*, 16 Wall. 203; *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Board of Liquidation* v. *McComb*, 92 U. S. 531. It is a case in which "a plain official duty, requiring no exercise of discretion, is to be performed," and where performance in the mode stipulated by the contract is refused. In such cases, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance. *Board of Liquidation* v. *McComb*, *supra*. The acts of 1882, in their application to the bonds issued under that of 1871, are unconstitutional and void, because they impair the obligation of the contract between the parties. The way is, therefore, clear for the court to apply the remedy allowed by the statute when the contract was made. That remedy is, in law, unaffected by subsequent unconstitutional legislation. The defendant cannot plead such legislation as an excuse for the non-performance of a plain official duty, requiring no exercise of discretion, because, as held in *Board of Liquidation* v. *McComb*, *supra*, in accordance with settled principles, "an unconstitutional law will be treated by the courts as null and void;" and "if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty," that will not prevent a *mandamus* from being issued, or an injunction being granted when that is necessary to prevent threatened injury.

One word in this connection about *Tennessee* v. *Sneed*, 96 U. S. 69, to which the court refers as authority for the present decision. In the brief of the Attorney-General of Virginia the names of the justices who participated in that decision are given, and mine is placed among the number. This is an error into which counsel naturally fell by reason of the fact that there are cases in the same volume preceding *Tennessee* v. *Sneed*, and cases in the previous volume of our reports, in the decision of which I participated. In fact, however, that

case was determined, and the decision therein announced, before I became a member of this court.

Touching *Tennessee* v. *Sneed*, I may say that it does not militate against the views I have expressed. Upon the face of that decision it appears that this court, accepting as authority a decision of the Supreme Court of Tennessee, held that when the contract there in question was made, no remedy by *mandamus* was given against an officer of the State, charged with the collection of the revenue. And to show that the court did not have before it, and did not decide, any case of the impairment of the obligation of a contract through the withdrawal of existing remedies by subsequent legislation, I quote this language from the opinion of Mr. Justice Hunt, speaking for the court: "The question discussed by Mr. Justice Swayne, in *Walker* v. *Whitehead*, 16 Wall. 314, of the preservation of the laws in existence at the time of the making of the contract, is not before us. The claim is of a subsequent injury to the contract."

Without further elaboration, and referring to the authorities cited in the dissenting opinion of my brother Field, I content myself with saying that the principles of law applicable to the present cases are stated in *McCracken* v. *Hayward*, 2 How. 608, 612, 613, where this court, speaking by Mr. Justice Baldwin, said: "The obligation of a contract consists in its binding force on the party who makes it. This depends upon the laws in existence when it is made. These are necessarily referred to in all contracts, and form a part of them as the measure of the obligations to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract in favor of one party to the injury of the other; hence, any law which in its operation amounts to a denial or an obstruction of the rights accruing by a contract, though professing to act only on

the remedy, is directly obnoxious to the prohibition of the Constitution. . . . The obligation of the contract between the parties in this case was to perform the promises and undertakings contained therein; the right of the plaintiff was to damages for the breach thereof, to bring suit and obtain judgment, to take out and prosecute an execution against the defendant till the judgment was satisfied, pursuant to the existing laws of Illinois. These laws giving these rights were as perfectly binding on the defendant, and as much a part of the contract, as if they had been set forth in its stipulations in the very words of the law relating to judgments and executions."

Mr. Justice Story, in his Commentaries on the Constitution (vol. ii. p. 245), says that any deviation from the terms of a contract, by postponing or accelerating the performance it prescribes, or imposing conditions not expressed in the contract, or dispensing with the performance of those which are a part of the contract, impairs its obligation. And Judge Cooley, in his Treatise on Constitutional Limitations, summarizes, as I think correctly, the doctrines of numerous adjudged cases in this and other courts, when he says that "where a statute does not leave a party a substantial remedy, according to the course of justice as it existed at the time the contract was made, but shows upon its face an intention to clog, hamper, or embarrass the proceedings to enforce the remedy so as to destroy it entirely, and thus impair the contract, so far as it is in the power of the legislature to do it, such statute cannot be regarded as a mere regulation of the remedy, and is void" (p. 289), — language strikingly applicable to the legislation of Virginia.

By an act passed by the legislature of Virginia on the 7th of March, 1872, collectors of taxes were required to accept, in payment of taxes, nothing but gold and silver coin, United States treasury notes, and notes of national banks. But the Supreme Court of Appeals of that Commonwealth pronounced it to be unconstitutional as applied to the holders of bonds and coupons issued under the Funding Act of 1871. 22 Gratt. 933; 24 id. 169; 30 id. 137. Other statutes were subsequently passed plainly having for their object the destruction of the contracts made under and in pursuance of the Funding Act of 1871. The constitutional validity of that legislation was

involved in *Hartman* v. *Greenhow*, 102 U. S. 672. This court there, with only one dissenting voice, sustained the right of taxpayers, holding coupons issued under the act of 1871, to have them received in payment of taxes. Finally came the enactments of 1882, which have so changed the remedies existing when bonds were issued under the act of 1871 that taxpayers holding coupons of such bonds cannot use them in payment of taxes without expending more money to enforce a compliance with their contract than the coupons are worth.

I cannot agree that the courts of the Union are powerless against State legislation which is so manifestly designed to destroy contract rights protected by the Constitution of the United States.

Without stopping to speculate upon the disastrous consequences which would result both to the business interests and to the honor of the country if all the States should enact statutes similar to those passed by Virginia, I sum up what has been so imperfectly said by me: If, as is conceded, Antoni is entitled by the contract to have his coupon received in payment of taxes, when offered for that purpose, and if, as is also conceded in the opinion of the majority, he was entitled, by the laws in force when the contract was made, to the remedy of *mandamus* to compel the tax-collector to receive his coupons and discharge *pro tanto* his taxes, it is clear that the subsequent statute does impair the obligation of the contract, by imposing new and burdensome conditions, which not only prohibit the collector from receiving coupons in payment of taxes when offered, but require the taxpayer to pay his taxes in money, not to be returned to him unless, upon the occasion of each tender of coupons, he submits (without the possibility of recovering his costs of suit) to a jury trial, and proves to the satisfaction of twelve jurymen that the coupons tendered are genuine and legally receivable for taxes.

Upon the grounds stated I dissent from the judgment.

INDEX.

ACCOUNT STATED.

Unless objected to within a reasonable time, — and what constitutes such a reasonable time is a question of law, — an account rendered becomes an account stated, and cannot be impeached except for fraud or mistake. *Oil Company* v. *Van Etten*, 325.

ADMIRALTY. See *Appeal*, 2–4; *Maritime Law; Prize.*

1. Under the act of Feb. 16, 1875, c. 77, a finding in a case of admiralty and maritime jurisdiction on the instance side of the Circuit Court has the effect of a special verdict in an action at law, and although no exceptions are filed, its sufficiency in connection with the pleadings to support the decree rendered is open to consideration on appeal. *The "Adriatic,"* 512.
2. A sailing-vessel meeting a steamer should keep her course, unless it is manifest that she would thereby occasion a collision. Where, therefore, as in this case by her unnecessary changes of course, she misled and embarrassed an approaching steamer that was laboring to keep out of her way, and a collision occurred whereby she was sunk, whereas had she kept on the course she was sailing when first seen by the steamer, or adhered to her first new course afterwards taken, a collision would not have happened, — *Held*, that the steamer is not liable. *Id.*

AGENCY. See *Maritime Law; Railroad*, 1.

ALABAMA. See *Causes, Removal of*, 3.

ALE. See *Customs Duties*, 5.

ALIENS. See *Constitutional Law*, 1–4.

APPEAL. See *Admiralty*, 1; *Appeal Bond; National Banks*, 5.

1. An appeal will not be dismissed by reason of the omission of certain persons who were parties to the suit in the court below, if they have no interest in maintaining or reversing the decree. *Basket* v. *Hassell*, 602.
2. When persons summoned as garnishees in a libel in admiralty *in personam* are adjudged by the court to have a fund of the principal defendant in their hands and to pay it into court, and the libellant afterwards obtains a final decree against him with an award of exe-

APPEAL (*continued*).

cution against the fund in their hands, the first order is interlocutory, and they can appeal from the last decree only. *Cushing* v. *Laird*, 69.

3. Where, in a suit in admiralty by one insurance company against another upon a contract of reinsurance, it became essential for the libellant to show that the risk which it had assumed was the same as that insured against by the policy sued on, and the Circuit Court asserted the identity of the insurances, not in the findings of fact, but as a conclusion of law, the question on appeal is not whether that might be true as a presumption or inference of fact from the circumstances stated in the findings, but whether, upon the facts found, it must be true as a matter of law. *Sun Mutual Insurance Company* v. *Ocean Insurance Company*, 485.
4. The rule established in *United States* v. *Pugh*, 99 U. S. 265, as to findings of fact in cases from the Court of Claims, applies to appeals from decrees in admiralty, under the act of Feb. 16, 1875, c. 77. *Id.*

APPEAL BOND.

1. An appeal bond in an ordinary foreclosure suit in a court of the United States does not operate as security for the amount of the original decree; nor for the interest accruing thereon pending the appeal; nor for the balance due after applying the proceeds of the mortgaged premises; nor for the rents and profits, or the use and detention of the property pending the appeal; but only for the costs of the appeal, and the deterioration or waste of the property, and perhaps burdens accruing upon it by non-payment of taxes, and loss by fire if it be not properly insured. *Quære*, Is its mere depreciation in market value any cause of recovery on the bond. *Kountze* v. *Omaha Hotel Company*, 378.
2. An appeal bond in such a suit, instead of following the statutory requirement, "that the appellant shall prosecute his appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs," superadds the words that he shall "pay for the use and detention of the property covered by the mortgage in controversy during the pendency of the appeal." In an action on the bond, — *Held*, that these words must be rejected, and the bond construed as having its ordinary and proper legal effect, the judge taking it having no right to exact such an addition to the condition of an appeal and *supersedeas*. *Id.*
3. This case distinguished from those in which official bonds, and bonds given to the government for the purpose of enjoying some office or privilege, have been sustained as contracts at common law. *Id.*

ARKANSAS.

1. The statute of Arkansas prescribing the manner in which property assigned for the benefit of creditors shall be sold is mandatory. *Jaffray* v. *McGehee*, 361.

ARKANSAS (*continued*).

2. An assignment made in the State is void if it vests in the assignee a discretion in conflict with the provisions of that statute, and authorizes him in effect to sell such property in a manner which they do not permit. *Id.*

ARMY. See *Officer of the Army.*

ASSIGNEE IN BANKRUPTCY. See *Bankruptcy.*

ASSIGNMENT. See *Equity*, 2; *Gift; Receiver*, 2.

ASSIGNMENT FOR CREDITORS. See *Arkansas.*

ATTACHMENT. See *Appeal*, 2; *Bankruptcy.*

ATTORNEY.

A rule was made by the Circuit Court of the United States for the Southern District of Florida, which, after reciting that it had come to the knowledge of the court that W., an attorney of the court, did, on a day specified, engage in and with an unlawful, tumultuous, and riotous gathering, he advising and encouraging thereto, take from the jail of Hillsborough County, and hang by the neck until he was dead, one John, otherwise unknown, thereby showing such an utter disregard and contempt for the law which, as a sworn attorney, he was bound to support, as shows him to be totally unfitted to occupy such position: thereupon cited him to appear at a certain time and show cause why his name should not be stricken from the roll. The attorney appeared, and answered, denying the charge in mass, and excepting to the jurisdiction of the court, (1) because there was no charge against him under oath, (2) because the offence charged was a crime by the laws of Florida for which he was liable to be indicted and convicted. The court overruled the exceptions, and called a witness who proved the charge, showing that the hanging took place before the court-house door, during a temporary recess of the court; thereupon the court made an order striking W.'s name from the roll. On motion made here for a *mandamus* to compel the judge of that court to reverse this order, and he having answered the rule, showing the special circumstances of the case, — *Held*, 1. That although not strictly regular to grant a rule to show cause why an attorney should not be struck off the roll, without an affidavit making charges against him, yet that, under the special circumstances of this case, the want of such affidavit did not render the proceeding void as *coram non judice*. 2. That the acts charged against the attorney constituted sufficient ground for striking his name from the roll. 3. That although, in ordinary cases, where an attorney commits an indictable offence, not in his character of attorney, and does not admit the charge, the courts will not strike his name from the roll until he has been regularly indicted and convicted, yet that the rule is not an inflexible one; that there may be cases in which it is proper for the court to proceed without such previous conviction; and that the present

ATTORNEY (*continued*).

case, in view of its special circumstances, the evasive denial of the charge, the clearness of the proof, and the failure to offer any counter proof, was one in which the court might lawfully exercise its summary powers. 4. That the proceeding to strike an attorney from the roll is one within the proper jurisdiction of the court of which he is an attorney, and does not violate the constitutional provision which requires an indictment and trial by jury in criminal cases; that it is not a criminal proceeding, and not intended for punishment, but to protect the court from the official ministration of persons unfit to practise as attorneys therein. 5. That such a proceeding is not an invasion of the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law; but that the proceeding itself, when instituted in proper cases, is due process of law. 6. That, as the court below did not exceed its powers in taking cognizance of the case, no such irregularity occurred in the proceeding as to require this court to interpose by the writ of *mandamus*. *Ex parte Wall*, 265.

BANKRUPTCY. See *United States, Claims by and against.*

A State court, in which an action against a bankrupt upon a debt provable in bankruptcy is pending, must, on his application under sect. 5106 of the Revised Statutes, stay all proceedings to await the determination of the court in bankruptcy on the question of his discharge, unless unreasonable delay on his part in endeavoring to obtain his discharge is shown, or the court in bankruptcy gives leave to proceed to judgment for the purpose of ascertaining the amount due; even if an attachment has been sued out in the action more than four months before the commencement of the proceedings in bankruptcy, and has been dissolved by giving bond with sureties to pay the amount of the judgment which might be recovered. And if the highest court of the State denies the application, and renders final judgment against the bankrupt, he may, although he has since obtained his certificate of discharge, bring a writ of error, and his assignee may be heard here in support of the writ. *Hill* v. *Harding*, 631.

BANKS AND BANKING. See *National Banks.*

BEER. See *Customs Duties*, 5.

BILLS OF EXCHANGE AND PROMISSORY NOTES. See *Jurisdiction*, 12, 13.

BOND. See *Appeal Bond; Equity*, 4; *Louisiana; Municipal Bonds; Public Lands*, 2; *Virginia.*

BOTTLES. See *Customs Duties*, 5.

BOTTOMRY BOND. See *Maritime Law.*

BRIDGES. See *Navigable Waters.*

BURDEN OF PROOF. See *Maritime Law*, 2.

CASES AFFIRMED OR FOLLOWED.

The following, among others, expressly approved and affirmed: —

Chy Lung v. *Freeman*, 92 U. S. 259. See *People* v. *Compagnie Générale Transatlantique*, 59.

Fosdick v. *Schall*, 99 U. S. 235. See *Union Trust Company* v. *Souther*, 591.

Harter v. *Kernochan*, 103 U. S. 562. See *Pana* v. *Bowler*, 529.

Hayward v. *Andrews*, 106 U. S. 672. See *New York Guaranty Company* v. *Memphis Water Company*, 205.

Henderson v. *Mayor of New York*, 92 U. S. 275. See *People* v. *Compagnie Générale Transatlantique*, 59.

Miltenberger v. *Logansport Railway Company*, 106 U. S. 286. See *Union Trust Company* v. *Souther*, 591.

Stark v. *Starrs*, 6 Wall. 402. See *Missionary Society* v. *Dalles*, 336.

United States v. *Pugh*, 99 U. S. 265. See *Sun Marine Insurance Company* v. *Ocean Insurance Company*, 485.

CASES QUALIFIED OR OVERRULED.

Shelton v. *The Collector*, 5 Wall. 113. See *United States* v. *Phelps*, 320.

CAUSES, REMOVAL OF. See *Civil Rights*, 1; *Jurisdiction*, 6.

1. Section 643 of the Revised Statutes, which provides for removing to the Circuit Courts suits or criminal prosecutions commenced in a State court against "any officer appointed under or acting by authority of any revenue law, or any person acting under or by authority of such officer," applies to marshals of the United States, their deputies and assistants, when engaged in enforcing a revenue law of the United States. *Davis* v. *South Carolina*, 597.
2. Where such a prosecution is duly removed, the jurisdiction of the Circuit Court completely vests, and the subsequent action of the State court, forfeiting the recognizance of the defendant for his non-appearance there, is *coram non judice* and void. *Id.*
3. The Memphis and Charleston Railroad Company is made by the statutes of Alabama an Alabama corporation; and, although previously incorporated in Tennessee also, cannot remove into the Circuit Court of the United States a suit brought against it in Alabama by a citizen of Alabama. *Memphis and Charleston Railroad Company* v. *Alabama*, 581.

CEMETERY COMPANY. See *Corporation*, 3.

CHARITABLE GIFTS AND DEVISES. See *Will.*

William Russell, of St. Louis, "for the purpose of founding an institution for the education of youth in St. Louis County, Missouri," granted lands and personal property in Arkansas to John S. Horner and his successors, in trust "for the use and benefit of the Russell Institute of St. Louis, Missouri," with directions to the grantee to sell them, and to account for and pay over the proceeds "to Thomas Allen, President of the Board of Trustees of the said Russell Institute at St. Louis, Missouri," whose receipt should be a full discharge to the grantee. *Held*, that this was a charitable gift, valid against

CHARITABLE GIFTS AND DEVISES (*continued*).
the donor's heirs and next of kin, although the institution was neither established nor incorporated in the lifetime of the donor or of Allen. *Russell* v. *Allen*, 163.

CHICAGO RIVER. See *Navigable Waters.*

CHOSE IN ACTION. See *Equity*, 2; *Gift.*

CITIZENSHIP. See *Causes, Removal of*, 3; *Civil Rights*, 1; *Jurisdiction*, 5, 7–12.

CIVIL RIGHTS.
1. Where the highest court of the State had declared to be unconstitutional her statute whereby, because of their race and color, citizens of African descent were excluded from grand and petit juries, and it had further decided that the officer summoning or selecting jurors must disregard race or color, a person of that descent against whom a criminal prosecution was subsequently instituted in the State court has no just ground for declaring, in advance of a trial, that he was denied, or that in the State tribunals he cannot enforce, the equal civil rights secured to him as a citizen by the Constitution or the statutes of the United States. The case was not, therefore, removable to the Circuit Court, nor should the panel of petit jurors be set aside simply on the ground that it consisted wholly of white persons. *Bush* v. *Kentucky*, 110.
2. Where pursuant to such a statute, and before its unconstitutionality was so declared, the grand jurors were selected who found the indictment against the prisoner, a person of that descent, the court of original jurisdiction should, on his motion, set aside the indictment. *Id.*

CLAIMS BY AND AGAINST THE UNITED STATES. See *Contract*, 2; *Court of Claims; Pension.*

COLLATERAL SECURITY. See *Missouri; National Banks*, 1.

COLLECTOR OF CUSTOMS. See *Customs, Collector of.*

COLLISION. See *Admiralty*, 2.

COMITY. See *Jurisdiction*, 7–11.

COMMERCE. See *Constitutional Law*, 1–4; *Ferry*, 4; *Inspection Laws Navigable Waters; Wharves and Wharfage.*

COMMON CARRIERS. See *Railroad.*

COMPROMISE. See *Swamp and Overflowed Lands*, 3.

COMPTROLLER OF THE CURRENCY. See *National Banks*, 4.

CONFLICT OF LAWS. See *Municipal Bonds*, 10; *Will*, 3, 4.

CONGRESS. See *Inspection Laws*, 3; *Navigable Waters; Officer of the Army.*

CONSPIRACY. See *Equity*, 1.

CONSTITUTIONAL LAW. See *Attorney; Civil Rights; Corporation*, 3; *Ferry*, 4; *Inspection Laws*, 1, 3; *Louisiana; Municipal Bonds*, 2, 3, 11, 12; *Navigable Waters; Virginia; Wharves and Wharfage.*

1. The statute of New York of May 31, 1881, imposing a tax on every alien passenger who shall come by vessel from a foreign country to the port of New York, and holding the vessel liable for the tax, is a regulation of foreign commerce, and void. *Henderson* v. *Mayor of New York*, 92 U. S. 259, and *Chy Lung* v. *Freeman*, id. 275, cited, and the rulings therein made reaffirmed. *People* v. *Compagnie Générale Transatlantique*, 59.
2. The statute is not relieved from this constitutional objection by declaring in its title that it is to raise money for the execution of the inspection laws of the State, which authorize passengers to be inspected in order to determine who are criminals, paupers, lunatics, orphans, or infirm persons, without means or capacity to support themselves, and subject to become a public charge, as such facts are not to be ascertained by inspection alone. *Id.*
3. The words "inspection laws," "imports," and "exports," as used in cl. 2, sect. 10, art. 1, of the Constitution, have exclusive reference to property. *Id.*
4. This is apparent from the language of cl. 1, sect. 9, of the same article, where, in regard to the admission of persons of the African race, the word "migration" is applied to free persons, and "importation" to slaves. *Id.*
5. A. was convicted of murder in the first degree, and the judgment of condemnation was affirmed by the Supreme Court of Missouri. A previous sentence pronounced on his plea of guilty of murder in the second degree, and subjecting him to an imprisonment for twenty-five years, had, on his appeal, been reversed and set aside. By the law of Missouri in force when the homicide was committed this sentence was an acquittal of the crime of murder in the first degree; but before his plea of guilty was entered the law was changed, so that by force of its provisions, if a judgment on that plea be lawfully set aside, it shall not be held to be an acquittal of the higher crime. *Held*, that as to this case the new law was an *ex post facto* law, within the meaning of sect. 10, art. 1, of the Constitution of the United States, and that he could not be again tried for murder in the first degree. *Kring* v. *Missouri*, 221.
6. The history of the *ex post facto* clause of the Constitution reviewed in connection with its adoption as a part of the Constitution, and with its subsequent construction by the Federal and the State courts. *Id.*
7. The distinction between retrospective laws, which relate to the remedy or the mode of procedure, and those which operate directly on the offence, is unsound where, in the latter case, they injuriously affect any substantial right to which the accused was entitled under the law as it existed when the alleged offence was committed. *Id.*
8. Within the meaning of the Constitution, any law is *ex post facto* which

CONSTITUTIONAL LAW (*continued*).
is enacted after the offence was committed, and which, in relation to it or its consequences, alters the situation of the accused to his disadvantage. *Id.*

CONTRACT. See *Appeal Bond; Insurance; Railroad*, 2–6.
1. In construing contracts, a court may look not only to their terms, but to their subject-matter and the surrounding circumstances, and avail itself of the same light which at the time of making them the parties possessed. *Merriam* v. *United States*, 437.
2. Under the contract sued on in this case, *ante*, p. 437, the United States was not bound to receive a greater quantity of oats than that which is therein specifically mentioned. *Id.*
3. A. made a contract with B. to deliver a specified number of matched barrel-headings, to be properly piled on the land of B., who was to furnish a man to count them, as they were from time to time piled, in order to obtain an approximate estimate of the quantity piled, and thus to determine the amount of advances to A. under his contract; but the inspection and final count was to be made by an inspector appointed by B. at a point to which the latter shipped them. The property in the headings was to pass to B. on the delivery of them on his land. In a suit to recover the contract price of them, — *Held*, 1. That no error was committed by the trial court in admitting evidence of the counts by both parties of the whole number of single pieces of heading, and submitting to the jury the comparison between them, the court having ruled that the inspector's final count, which formed the basis of an estimate and average from which the number of matched headings was deduced, was, if made fairly and in the exercise of his best judgment, binding on the parties, unless its variance from the actual truth was too great to be accounted for by mere error of judgment in the matter of matching. 2. That although there was no evidence to show that all the pieces of heading shipped were in fact delivered at the point to which they had been sent, the jury were not bound to assume a loss in transportation in order to account for the discrepancy between the two counts. *Oil Company* v. *Van Etten*, 325.

CORPORATION. See *Causes, Removal of*, 3; *Charitable Gifts and Devises; Missouri; National Banks; Railroad; Will*, 6–8, 11.
1. Restrictions imposed by the charter of a corporation upon the amount of property that it may hold cannot be taken advantage of collaterally by private persons, but only in a direct proceeding by the State. *Jones* v. *Habersham*, 174.
2. The provision of the Constitution of Georgia of 1868, which declares that "the General Assembly shall have no power to grant corporate powers and privileges to private companies" (with certain exceptions), "but it shall prescribe by law the manner in which such powers shall be exercised by the courts," does not take away from the General Assembly the power to amend the charters of existing corporations by modifying or enlarging their powers. *Id.*

CORPORATION (*continued*).

8. A cemetery company was incorporated in 1854 by an act of Congress which authorized it to purchase and hold ninety acres of land in the District of Columbia, and to receive gifts and bequests for the purpose of ornamenting and improving the cemetery; enacted that its affairs should be conducted by a president and three other managers, to be elected annually by the votes of the proprietors, and to have power to lay out and ornament the grounds, to sell or dispose of burial lots, and to make by-laws for the conduct of its affairs and the government of lot-holders and visitors; fixed the amount of the capital stock, to be divided among the proprietors according to their respective interests; and provided that the land dedicated to the purposes of a cemetery should not be subject to taxation of any kind, and no highways should be opened through it, and that it should be lawful for Congress thereafter to alter, amend, modify, or repeal the act. Presently afterwards thirty of the ninety acres were laid out as a cemetery, the cemetery was dedicated by public religious services, and a pamphlet was published, containing a copy of the charter, a list of the officers, an account of the proceedings at the dedication, describing the cemetery as "altogether comprising ninety acres, thirty of which are now fully prepared for interments," and the by-laws of the corporation, which declared that all lots should be held in pursuance of the charter. No stock was ever issued. But the owner of the whole tract, named in the charter as one of the original associates, and in the list published in the pamphlet as the president and a manager of the corporation, knowing all the above facts, and never objecting to the appropriation of the property as appearing thereby, for more than twenty years managed the cemetery, sold about two thousand burial lots, and gave to each purchaser a copy of the pamphlet, and a deed of the lot, signed by himself as president, bearing the seal of the corporation, and having the by-laws printed thereon. In 1877 Congress passed an act, amending the charter of the corporation, providing that its property and affairs should be managed, so as to secure the equitable rights of all persons having any vested interest in the cemetery, by a board of five trustees to be elected annually, three by the proprietors of lots owned in good faith upon which a burial had been made, and two by the original proprietors; and that of the gross receipts arising from the future sale of lots one-fourth should be annually paid by the trustees to the original proprietors and the rest be devoted to the improvement and maintenance of the cemetery. *Held*, that the act of 1877 was a constitutional exercise of the power of amendment reserved in the act of 1854; that the owner of the land was estopped to deny the existence of the corporation, the setting apart of the whole ninety acres as a cemetery, and the right of the lot-holders to elect a majority of the trustees; and that he was in equity bound to convey the whole tract to the corporation in fee, and to account to the corporation for three-fourths of the sums received by him from sales of lots since the act of 1877; and

CORPORATION (*continued*).
the corporation to pay him one-fourth of the gross receipts from future sales of lots. *Close* v. *Glenwood Cemetery*, 466.

COSTS. See *Appeal Bond*, 1, 2.

COTTON LACES AND INSERTINGS. See *Customs Duties*, 6, 7.

COUNTY. See *Swamp and Overflowed Lands*, 3.

A. conveyed, March 5, 1859, to a county in Nebraska certain lands for a "poor-farm," and they were thereafter used as such. The county, pursuant to its agreement, made one cash payment, and for the remainder of the stipulated consideration gave its notes secured by mortgage, and payable respectively in one, two, three, and four years. A. assigned the notes to B. Some time thereafter, the Supreme Court of the State decided that, by the purchase of lands for such a purpose, a county could not be bound to pay at any specified time the purchase-money, or to secure it by mortgage upon them, but was limited to a payment in cash and to the levy of an annual tax to create a fund wherewith to pay the residue. A. and B., the notes remaining unpaid, filed, Sept. 10, 1877, a bill praying for a reconveyance and an accounting, or, should the county elect to retain the lands, then for a decree for the value of them. *Held*, 1. That in view of that decision, the contract being unauthorized only so far as it relates to the time and mode of paying the purchase-money, and the title to the lands having passed by the conveyance, the county holds that title as a trustee for the benefit of B., and that he is entitled to the relief prayed for. 2. That unless the sum due on account of the purchase-money, after a proper allowance shall be made as a compensation for a failure of A.'s title to a small part of the lands, be paid within a reasonable time, to be fixed by the court below, having reference to the necessity of raising the same by taxation, as prescribed and limited by the statute, the county be required to execute and deliver a deed, releasing to A. all the title acquired under his deed, and that he convey the same to B. 3. That the suit is not barred by the Statute of Limitations. *Chapman* v. *County of Douglas*, 348.

COUPONS. See *Louisiana; Municipal Bonds*, 5, 8–11; *Virginia*.

COURT OF CLAIMS. See *Customs, Surveyor of*.

1. A party who, under sect. 4 of the act of Aug. 5, 1861, c. 45, is entitled to the drawback there mentioned may, when payment thereof has been refused, maintain a suit therefor in the Court of Claims against the United States. *Campbell* v. *United States*, 407.
2. In computing the six years after his claim against the United States first accrues within which it may be filed in the Court of Claims, the period must be included when the claimant was unable to sue in that court by reason of the aid he gave to the rebellion. *Kendall* v. *United States*, 123.
3. The petition is bad on demurrer when it appears therefrom that the claimant's right of action against the United States is barred by the lapse of time. *Id.*

COURTS OF THE UNITED STATES. See *Court of Claims; District of Columbia*, 1; *Equity*, 3; *Jurisdiction; Louisiana*, 2.

CRIMINAL LAW. See *Attorney; Civil Rights; Constitutional Law*, 5–8; *Jurisdiction*, 6.

1. The counts of an indictment against the president of a national banking association for making such a false entry on its books as is punishable under sect. 5209 of the Revised Statutes are sufficient if they are in the form hereinafter set forth, *ante*, p. 656, as the offence is thereby alleged in apt terms, and with the requisite averments of time and place. *United States* v. *Britton*, 655.
2. The counts which charge his fraudulent purchase of shares of the capital stock of the association are bad if they either fail to state for whose use the purchase was made, or if they state that it was made for the use of the association, or if they do not aver that it was not made in order to prevent loss on some previously contracted debt. *Id.*
3. The counts which charge him with having wilfully misapplied the funds of the association should aver that he did so for the benefit of himself or some person or body other than the association, and with intent to injure or defraud the association or some other person or body corporate. *Id.*
4. The counts which charge his fraudulent purchase of the shares of stock, and allege that they were by him held "in trust for the use of said association, and that said shares were not purchased as aforesaid in order to prevent loss upon any debts theretofore contracted with said association in good faith," do not allege with sufficient certainty an offence under said sect. 5209. *Id.*
5. The purchase of stock in violation of sect. 5201, if made with intent to defraud, and by one or more of the officers of the bank named in said sect. 5209, is not a crime punishable under the latter section. *Id.*
6. An indictment for perjury against an officer of a national bank, for a wilfully false declaration or statement in a report made under sect. 5211 of the Revised Statutes is bad, if, prior to the passage of the act of Feb. 26, 1881, c. 82, his oath verifying the report was taken before a notary public appointed by a State, as such a notary had at that time no authority under a law of the United States to administer the oath. *United States* v. *Curtis*, 671.

CUSTOMS, COLLECTOR OF. See *Customs Duties*, 8.

1. Where a collector of customs brings a writ of error to review a judgment recovered against him for moneys exacted by and paid to him on entries, this court will, if it affirms the judgment, allow interest on it, under rule 23. *Schell* v. *Cochran*, 625.
2. In such a case, the "final judgment," the amount whereof is payable under sect. 989 of the Revised Statutes, is that rendered by the court below pursuant to the mandate of this court. *Id.*

CUSTOMS, SURVEYOR OF.

A. was surveyor of customs from June 13, 1872, to May, 1876, at Troy, N. Y., which was a port of delivery, but not of entry, in the collection district of the city of New York. At various times during the period from June 13, 1872, to June 22, 1874, there was a surveyor of customs at the port of New York, which was a port of entry, and there were surveyors of customs at two other ports in that district, which were ports of delivery and not ports of entry. In accordance with the uniform practice of the Treasury Department, under sect. 1 of the act of March 2, 1867, c. 188, repealed by sect. 2 of the act of June 22, 1874, c. 391, the Secretary of the Treasury distributed to the collector, naval officer, and surveyor at the port of New York, as such officers, and not as informers or seizing officers, one-fourth part of the proceeds of the fines, penalties, and forfeitures incurred at the port of New York between June 13, 1872, and June 22, 1874. A. made no question in regard to this practice until March, 1874, and when informed, in June of that year, that the department adhered to its construction of the act, he made no further complaint until March, 1877. He sued the United States in the Court of Claims in May, 1877, claiming that under said first section he was entitled to share in said one-fourth equally with the collector and the naval officer at the port of New York, and all the surveyors in the district. The court rejected the claim. *Held*, that the judgment was not erroneous. *Hahn* v. *United States*, 402.

CUSTOMS DUTIES. See *Court of Claims*, 1; *Inspection Laws*.

1. Dutiable goods cannot lawfully be imported in the foreign mail under the International Postal Treaty of Berne of Oct. 9, 1874. 19 Stat. 577. *Cotzhausen* v. *Nazro*, 215.
2. Such goods are, in the hands of the receiver of them from the post-office, subject to seizure; and the fact that there was no intent on the part of the sender or the receiver of them to defraud the United States of the duty, does not render the customs officer liable to an action for making the seizure. *Id.*
3. A claim for the appraisement of goods and the reduction of the duty thereon, by reason of the damage which they sustained during the voyage of importation, may be allowed, although not made until after they were entered at the custom-house at their full invoice value and the estimated duties thereon paid. *Shelton* v. *The Collector*, 5 Wall. 113, so far as it conflicts with this ruling, is overruled. *United States* v. *Phelps*, 320.
4. Section 2928, Rev. Stat., has exclusive reference to goods taken from a wreck. *Id.*
5. Under schedules B and D of sect. 2504 of the Revised Statutes, ale and beer imported in bottles are subject to a duty of thirty-five cents per gallon, and a further duty of thirty per cent *ad valorem* is imposed on the bottles. *Schmidt* v. *Badger*, 85.
6. By schedule D of the act of July 30, 1846, c. 74, a duty of twenty-five per cent *ad valorem* was imposed on "cotton laces, cotton insertings,"

CUSTOMS DUTIES (*continued*).

and "manufactures composed wholly of cotton, not otherwise provided for." By sect. 1 of the act of March 3, 1857, c. 98, the duties on the articles enumerated in schedules C and D of the act of 1846 were fixed at twenty-four and nineteen per cent, respectively, "with such exceptions as are hereinafter made" By sect. 2 of the act of 1857, "all manufactures composed wholly of cotton, which are bleached, printed, painted, or dyed, and delaines," were transferred to schedule C. *Held*, that laces and insertings composed wholly of cotton, and bleached or dyed, were dutiable at twenty-four per cent, under the act of 1857. *Barber* v. *Schell*, 617.

7. The designations qualified by the word "cotton," in the act of 1846, are designations of articles by special description, as contradistinguished from designations by a commercial name or a name of trade, and are designations of quality and material. *Id.*

8. Under the act of March 2, 1799, c. 23, the collector of customs is not entitled to a fee for putting on an invoice a stamp or certificate as to the presentation of the invoice, or for an oath to an entry or for a jurat to such oath, or for his order to the storekeeper to deliver examined packages. *Id.*

DAMAGES. See *Equity*, 1; *Jurisdiction*, 3.

DECREE. See *Admiralty*, 1; *Appeal*, 1, 2, 4; *Appeal Bond*, 1; *District of Columbia*, 2; *Equity Pleading and Practice; Jurisdiction*, 2; *Municipal Bonds*, 9; *Prize*.

DEED. See *County; Trust Deed*.

DELIVERY. See *Contract*, 3; *Gift*, 2.

DEMURRER. See *Court of Claims*, 3.

DEVISE. See *Will*.

DISTRICT ATTORNEY. See *Patent for Land*, 1.

DISTRICT OF COLUMBIA.

1. The Supreme Court of the District of Columbia is a court of the United States, and its judgment, when suit is brought thereon in any State of the Union, is, under the legislation of Congress, conclusive upon the defendant, except for such cause as would be sufficient to set it aside in the courts of the District. *Embry* v. *Palmer*, 3.

2. A. recovered judgment in that court against B. and C., who, when sued thereon in a State court, filed their bill to enjoin the collection of so much thereof as they claimed was in excess of the amount due on the original cause of action, and alleged, as a ground of relief, matter available as a defence in the action at law, which they were not prevented from setting up by accident, or by the fraud of A., unconnected with the negligence of themselves or agents. The court perpetually enjoined A. from suing on the judgment on their paying into court that amount. They did so, and A. received it.

DISTRICT OF COLUMBIA (*continued*).

The decree was affirmed by the court of last resort in the State. *Held*, 1. That, according to the law then in force in the District of Columbia, the bill not being sufficient to authorize the relief granted, the decree does not give the required effect to the judgment, and this court has jurisdiction to re-examine it on a writ of error. 2. That A., by accepting the amount so paid, is not estopped from prosecuting that writ. *Id.*

DONATIO CAUSA MORTIS. See *Gift*, 2.

DONATION. See *Municipal Bonds; Oregon*, 2.

DRAWBACK. See *Court of Claims*, 1.

DUE PROCESS OF LAW. See *Attorney*.

DUTIES. See *Customs Duties*.

ELECTIONS. See *Municipal Bonds*, 7, 8.

EQUITABLE ASSIGNMENT. See *Gift*, 1.

EQUITY. See *Trust Deed; Will*, 10.

1. Where the object of a suit in chancery is the recovery of the damages which the complainant alleges that he has sustained by reason of an unlawful and fraudulent conspiracy to cheat him out of his interest in an original invention, which is the subject-matter of the controversy, the bill should be dismissed, as his remedy is at law. *Ambler* v. *Choteau*, 586.
2. An assignee of a chose in action, or any other *cestui que trust*, cannot, merely on the ground that his interest is an equitable one, proceed in a court of equity to recover his demand. *Hayward* v. *Andrews*, 106 U. S. 672, cited upon this point and approved. *New York Guaranty Company* v. *Memphis Water Company*, 205.
3. The courts of the United States especially, in view of the act of Congress declaring that suits in equity shall not be sustained where there is a plain, adequate, and complete remedy at law, should enforce this rule. *Id.*
4. Certain parties holding bonds secured by a mortgage filed their bill to recover moneys alleged to be due on a contract which the city of Memphis made with the mortgagor, and which was assigned in the mortgage as part of the security for the bonds. *Held*, that the bill will not lie, the demand against the city being cognizable at law in the name of the mortgagor, and no special circumstances shown for a resort to equity. *Id.*

EQUITY PLEADING AND PRACTICE. See *District of Columbia*, 2; *National Banks*, 3.

Pending a bill in equity against the owner of land to compel a conveyance of the title, subject to certain rights of his in the rents and profits, a receiver appointed in another suit against him, and to whom he had by order of court in that suit assigned his interest in the land, applied to be and was made a defendant, and answered,

EQUITY PLEADING AND PRACTICE (*continued*).
and also filed a cross-bill against both the original parties, which was afterwards ordered to be stricken from the files, with leave for him to apply for leave to file a cross-bill; but he never applied for such leave. The case was heard upon pleadings and proofs, and a final decree entered ordering the original defendant to convey to the complainant, and the complainant to account to him or his assigns for part of the rents and profits, and that this decree be without prejudice to the rights of the receiver. *Held*, that the receiver was not aggrieved. *Close* v. *Glenwood Cemetery*, 466.

ESTOPPEL. See *Corporation*, 3; *District of Columbia*, 2; *Missouri*, 1; *Prize*.

EVIDENCE. See *Contract*, 3; *Jury*; *Letters-patent*, 6; *Missouri*, 1; *National Banks*, 4; *Witness*.
In a suit against a municipal corporation to recover damages for injuries received from a fall caused by a defective sidewalk, which was in an unguarded condition, it is competent for the plaintiff to show that whilst it was in that condition other like accidents had occurred at the same place. *District of Columbia* v. *Armes*, 519.

EXPORTS. See *Constitutional Law*, 3; *Court of Claims*, 1; *Inspection Laws*.

EX POST FACTO LAWS. See *Constitutional Law*, 5–8.

FALSE ENTRIES. See *Criminal Law*, 1.

FERRY.
1. The fourth section of the act of the legislature of Illinois passed in 1819, touching a ferry across the Mississippi River from a place in Illinois to the city of St. Louis, Missouri, declares: "That the ferry established shall be subject to the same taxes as are now, or hereafter may be, imposed on other ferries within this State, and under the same regulations and forfeitures." *Held*, that the section provides for equality of taxation; that is to say, that the property of the ferry company shall be valued and taxed by the same rule as other like property, and be subject to the same exactions and forfeitures; but the company is not exempted from any license tax on its ferry-boats which the State or a municipal corporation thereunto authorized might impose. *Wiggins Ferry Company* v. *East St. Louis*, 365.
2. The power to license is a police power, although it may also be exercised for the purpose of raising revenue. *Id.*
3. A State has the power to impose a license fee, either directly or through one of its municipal corporations, upon the ferry-keepers living in the State, for boats which they own and use in conveying from a landing in the State passengers and goods across a navigable river to a landing in another State. *Id.*
4. The levying of a tax upon such boats, although they are enrolled and licensed under the laws of the United States, or the exaction of a license fee by the State within which the property subject to

FERRY (*continued*).
the exaction has its *situs*, is not a regulation of commerce within the meaning of the Constitution of the United States, nor is such tax or fee a duty of tonnage if it be not graduated by the tonnage of the boats or by the number of times they cross the river or land within the limits of the State. *Id.*

FINES, PENALTIES, AND FORFEITURES. See *Customs, Surveyor of; Ferry*, 1.

FORECLOSURE. See *Appeal Bond; Jurisdiction*, 12; *Receiver*.

FRAUD. See *Criminal Law*, 1–5; *Customs Duties*, 2; *Equity*, 1; *National Banks*, 2.

GARNISHMENT. See *Appeal*, 2.

GEORGIA. See *Corporation*, 2; *Will*, 2, 5, 6, 10.

GIFT. See *Charitable Gifts and Devises*.
1. A certificate of deposit in these terms: —

"EVANSVILLE NATIONAL BANK,
"EVANSVILLE, IND., Sept. 8, 1875.

"H. M Chaney has deposited in this bank twenty-three thousand five hundred and fourteen $\frac{70}{100}$ dollars, payable in current funds, to the order of himself, on surrender of this certificate properly indorsed, with interest at the rate of six per cent per annum, if left for six months.
"$23,514.70. HENRY REIS, *Cashier*,"

— may, as a subsisting chose in action, be the subject of a valid gift, if the person therein named indorse and deliver it to the donee, and thus vest in him the whole title and interest therein, or so deliver it, without indorsement, as to divest the donor of all present control and dominion over it, and make an equitable assignment of the fund, which it represents and describes. *Basket* v. *Hassell*, 602.
2. A *donatio mortis causa* must, during the life of the donor, take effect as an executed and complete transfer of his possession of the thing and his title thereto, although the right of the donee is subject to be divested by the actual revocation of the donor, or by his surviving the apprehended peril, or by his outliving the donee, or by the insufficiency of his estate to pay his debts. If by the terms and condition of the gift it is to take effect only upon the death of the donor, it is not such a *donatio*, but is available, if at all, as a testamentary disposition. Where, therefore, during his last illness, and when he was in apprehension of death, the person named in the above certificate made thereon the following indorsement: —

"Pay to Martin Basket, of Henderson, Ky.; no one else; then not till my death. My life seems to be uncertain. I may live through this spell. Then I will attend to it myself.

"H. M. CHANEY,"

— and then delivered it to Basket, and died at his home in Tennessee, — *Held*, that Basket by such indorsement and delivery acquired no title to or interest in the fund. *Id.*

GUARANTY. See *Railroad*, 6.

HYPOTHECATION. See *Maritime Law.*

ILLINOIS. See *Ferry*, 1; *Municipal Bonds*, 5–10; *Navigable Waters.*

IMPORTS. See *Constitutional Law*, 3; *Court of Claims*, 1; *Customs Duties.*

INDIANS. See *Oregon*, 1.

INDICTMENT. See *Civil Rights; Criminal Law; Jurisdiction*, 6.

INDORSEMENT. See *Gift; Jurisdiction*, 12.

INFRINGEMENT. See *Letters-patent.*

INSANITY. See *Witness*, 1.

INSOLVENT DEBTOR. See *Bankruptcy; United States, Claims by and against.*

INSPECTION LAWS. See *Constitutional Law*, 1–4.

1. Section 41 of chapter 346 of the laws of Maryland of 1864, as amended and re-enacted by chapter 291 of the laws of 1870, provides as follows: "After the passage of this act, it shall not be lawful to carry out of this State, in hogsheads, any tobacco raised in this State, except in hogsheads which shall have been inspected, passed, and marked agreeably to the provisions of this act, unless such tobacco shall have been inspected and passed before this act goes into operation; and any person violating the provisions of this section shall forfeit and pay the sum of three hundred dollars, which may be recovered in any court of law of this State, and which shall go to the credit of the tobacco fund: *Provided*, that nothing herein contained shall be construed to prohibit any grower of tobacco, or any purchaser thereof, who may pack the same in the county or neighborhood where grown, from exporting or carrying out of this State any such tobacco without having the same opened for inspection; but such tobacco so exported or carried out of this State without inspection shall in all cases be marked with the name in full of the owner thereof, and the place of residence of such owner, and shall be liable to the same charge of outage and storage as in other cases, and any person who shall carry or send out of this State any such tobacco, without having it so marked, shall be subject to the penalty prescribed by this section." Under that proviso, no requirement of the act of 1864 is dispensed with, except that of having the hogshead opened for inspection. The hogshead must still be delivered at a State tobacco warehouse, and there numbered and recorded and weighed and marked, and be found to be of the dimensions prescribed by statute, and to have been packed and marked as required. *Held*, 1. That said section 41, as so amended and re-enacted, is not, in its provisions as to charges for outage and storage, in violation of clause 2 of section 10 of article 1 of the Constitution of the United States, as respects any impost or duty imposed by it

INSPECTION LAWS (*continued*).

on exports, or of the clause of section 8 of article 1 which gives power to the Congress "to regulate commerce with foreign nations and among the several States;" nor is it a regulation of commerce or unconstitutional, as discriminating between the State buyer and manufacturer of leaf tobacco and the purchaser who buys for the purpose of transporting the tobacco to another State or to a foreign country, or as discriminating between different classes of exporters of tobacco. 2. That the charge for outage, thereby made, is an inspection duty, within the meaning of the Constitution, and it is not foreign to the character of an inspection law to require every hogshead of tobacco to be brought to a State tobacco warehouse. 3. That dispensing with an opening for inspection of the hogsheads mentioned in the proviso does not, in view of the other provisions of the tobacco inspection statutes of the State, deprive those statutes of the character of inspection laws. *Turner* v. *Maryland*, 38.

2. The characteristics of inspection laws considered, with references to the legislation of the American colonies and the States on the subject. *Id.*
3. *Quære*, Is it not exclusively the province of Congress to determine whether a charge or duty, under an inspection law, is or is not excessive. *Id.*
4. The charge for outage in this case appears to be a charge for services properly rendered. *Id.*

INSURANCE. See *Appeal*, 3.

1. It is the duty of the assured to communicate all material facts, and he cannot urge as an excuse for his omission to do so that they were actually known to the underwriters, unless the knowledge of the latter was as full and particular as his own information. *Sun Mutual Insurance Company* v. *Ocean Insurance Company*, 485.
2. The exaction of information in some instances may be greater in a case of reinsurance than as between the parties to an original insurance. In the former, the party seeking to shift the risk he has taken is bound to communicate such information within his knowledge as would be likely to influence the judgment of an underwriter. *Id.*

INTEREST. See *Appeal Bond*, 1; *Customs, Collector of*, 1; *Jurisdiction*, 4; *Louisiana; Municipal Bonds*, 10; *National Banks*, 4; *Tax and Taxation.*

INVENTION. See *Equity*, 1; *Letters-patent.*

IOWA. See *Swamp and Overflowed Lands*, 3.

JUDGMENT. See *Customs, Collector of*, 2; *District of Columbia.*

A judgment entered by consent for a specific amount, subject to any credits which the defendant may produce vouchers for, is good as between the parties themselves and their privies. *Burgess* v. *Seligman*, 20.

JUDICIAL DISCRETION. See *Receiver*, 1.

JURISDICTION.

I. Of the Supreme Court. See *District of Columbia*, 2; *Missouri*, 2; *Railroad*, 5.

1. This court has jurisdiction to re-examine the judgment of the Supreme Court of a State, rendered adversely to the right and title which a party to the suit specially sets up to land under a patent issued by the United States to another under whom he claims. *Baldwin* v. *Stark*, 463.
2. This court has no jurisdiction to re-examine the judgment of a State court recognizing as valid the decree of a foreign court annulling a marriage. *Roth* v. *Ehman*, 319.
3. This court will not re-examine the order of the Circuit Court, refusing to set aside the verdict upon the ground that the jury awarded excessive damages. *Wabash Railway Company* v. *McDaniels*, 454.
4. Where a cause has been finally disposed of here, by the dismissal of the writ of error, this court has no power, at a subsequent term, to alter its judgment to one of affirmance, although, if there had been a judgment of affirmance, interest during the pendency of the writ would have been allowed on the amount of the judgment below, and in the judgment of dismissal no such interest was allowed. *Schell* v. *Dodge*, 629.

II. Of the Circuit Court. See *Attorney; Causes, Removal of; Wharves and Wharfage*, 5.

5. The Circuit Court cannot take jurisdiction of a suit removed from a State court under the third subdivision of sect. 639 of the Revised Statutes, on account of "prejudice or local influence," unless all the necessary parties on one side of the suit are citizens of different States from those on the other. *Myers* v. *Swann*, 546.
6. Where the Circuit Court quashes an indictment, found against the prisoner in a State court, wherefrom the cause was on his petition removed, it has no jurisdiction to proceed against him for the crime against the State wherewith he was charged. *Bush* v. *Kentucky*, 110.

III. In General. See *Attorney; Louisiana*, 2.

7. The courts of the United States, in the administration of State laws in cases between citizens of different States, have an independent jurisdiction co-ordinate with that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. *Burgess* v. *Seligman*, 20.
8. Where, however, by the course of the decisions of the State courts, certain rules are established which become rules of property and action in the State, and have all the effect of law, — especially with regard to the law of real estate and the construction of State constitutions and statutes, — the courts of the United States always regard such rules as authoritative declarations of what the law is. But where the law has not been thus settled, it is their right and duty to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence: and when contracts and transactions have been entered into and rights

JURISDICTION (*continued*).
have accrued thereon under a particular state of the decisions of the State tribunals, or when there has been no decision, the courts of the United States assert the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be given by the State courts after such rights have accrued. *Id.*
9. But even in such cases, for the sake of harmony and to avoid confusion, the courts of the United States will lean towards an agreement of views with the State courts, if the question seems to them balanced with doubt. *Id.*
10. Acting on these principles of comity, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the State courts. *Id.*
11. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it is their duty to exercise an independent judgment in cases not foreclosed by previous adjudication. *Id.*
12. The indorsee of "a promissory note negotiable by the law merchant," which the maker secured by a mortgage of land to the payee, is not precluded from maintaining a foreclosure suit in a court of the United States by the fact that the maker and the payee are citizens of the same State. *Tredway* v. *Sanger*, 323.
13. Where, in an action brought in a court of Virginia against an indorser of promissory notes, payable August, 1861, at Alexandria in that State, the point in controversy being as to the sufficiency of the notices of dishonor, and the court decided in substance that by the general principles of commercial law, if, during the late civil war, he abandoned his residence in loyal territory and went to reside permanently within the Confederate lines before the note matured, a notice left at his former residence was not sufficient to charge him, if his change of residence was known, or by the exercise of reasonable diligence might have been known, to the holder of the note when it matured, — *Held*, that no Federal question was raised by the decision. *Allen* v. *McVeigh*, 438.
14. Where the plaintiff's prayer for instructions relates also to the Virginia ordinance of secession and the proclamations of the President of April, 1861, and Aug. 16, 1861, but, as the case stood upon the evidence, neither of them was involved, and no title, right, privilege, or immunity thereunder was claimed by either party, — *Held*, that the prayer was properly refused; and, the only Federal question thereby sought to be raised having been correctly disposed of, this court cannot consider the other errors assigned. *Id.*

JURY. See *Civil Rights; Contract*, 3; *Jurisdiction*, 3; *Railroad*, 4.
The jury may be controlled in their determination of a question by a peremptory instruction, if the testimony is of such a conclusive

JURY (*continued*).
character as would compel the court, in the exercise of a sound legal discretion, to set aside a verdict if one were returned in opposition to such testimony. *Montclair* v. *Dana*, 162.

LAND GRANTS. See *Oregon; Patent for Land; Pre-emption; Public Lands; Swamp and Overflowed Lands.*

LAW AND FACT. See *Account Stated; Appeal*, 3, 4; *Jury; Maritime Law*, 2; *Railroad*, 4.

LEGACY. See *Will.*

LETTERS-PATENT.

1. It is the duty of the court to dismiss a suit brought to restrain the infringement of letters-patent, where the device or contrivance for which they were granted is not patentable, although such defence be not set up. *Slawson* v. *Grand Street Railroad Company*, 649.
2. The invention described in reissued letters-patent No. 4240, granted to John B. Slawson, Jan. 24, 1871, is not patentable, as it is confined to putting in the ordinary fare-box used on a street car an additional pane of glass opposite to that next the driver, so that the passenger can see the interior of the box. The letters are therefore void. *Id.*
3. Letters-patent No. 121,920, granted to Elijah C. Middleton, Dec. 12, 1871, are void. The fare-box, the head-light of the car, and the reflector are the elements of the contrivance described in the specification and claim for lighting the interior of the box at night, and they are old. What is covered by the letters is not patentable, as it is simply making in the top of the box an aperture through which the rays of the head-lamp are turned by means of a reflector. *Id.*
4. Letters-patent granted to Edwin L. Brady, Dec. 17, 1867, for an improved dredge-boat for excavating rivers, are invalid for want of novelty and invention. *Atlantic Works* v. *Brady*, 192.
5. The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. It was never their object to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. *Id.*
6. Although letters-patent are not set up by way of defence in an answer, yet if the invention patented thereby is afterwards put into actual use, their date will be evidence of that of the invention on a question of priority between different parties. *Id.*
7. One person receiving from another a full and accurate description of a useful improvement cannot appropriate it to himself; and letters-patent obtained by him therefor are void. *Id.*
8. Whether claim 3 of letters-patent No. 67,046, granted to Joseph L. Hall, July 23, 1867, for an "improvement in connecting doors and casings of safes," — namely, "3. The conical or tapering arbors, 1,

LETTERS-PATENT (*continued*).
in combination with two or more plates of metal, in the doors and casings of safes and other secure receptacles, the arbors being secured in place in the plates by keys, 2, or in other substantial manner," — claims arbors which are tapped into two or more plates, or whether it excludes, as a part of it, screw-threads cut on the arbors, is immaterial in the present case, because, under the former view, the defendants are not shown to have used arbors with screw-threads on any part of the arbor within the plates, and, under the latter view, the claim is invalid. *Hall* v. *Macneale*, 90.

9. The whole invention is described in letters-patent No. 30,140, granted to Hall, Sept. 25, 1860, for an "improvement in locks," and a cored conical bolt with a screw-thread on it is shown in those letters. A solid conical bolt having existed, adding the screw-thread to it is not an invention. *Id.*

10. Solid conical bolts without screw-threads having been used in two safes made and sold by the inventor more than two years before his letters were applied for, the invention covered by claim 3 was in public use and on sale, with his consent and allowance, so as to make the claim invalid under sects. 7 and 15 of the act of July 4, 1836, c. 357, and sect. 7 of the act of March 3, 1839, c 88. *Id.*

11. Where, within four months before their expiration, letters-patent, covering a single claim for a combination of several elements, are reissued and extended, with the same description as before, but containing in addition to the original claim one for a combination of some of the elements only, the reissue is invalid as to the new claim. *Gage* v. *Herring*, 640.

12. Letters-patent for a combination of several elements are not infringed by using less than all the elements. *Id.*

13. In letters-patent for an improvement in cooling and drying meal during its passage from the millstones to the bolts, the claim was for the arrangement and combination of a fan, producing a suction blast; the meal chest; a spout forming a communication between the fan and the meal chest; a dust room above, to catch the lighter part of the meal thrown upwards by the current of air; a rotating spirally-flanched shaft in the meal chest, conveying the meal to the elevator; a similar shaft in the dust room, conveying the meal dust to the elevator; and the elevator, taking the meal to the bolts. Within four months before the expiration of the letters, they were reissued and extended, with two claims, the one a repetition of the original claim, and the other for the combination of the fan, the communicating spout, the meal chest with the conveying shaft in it, and the elevator, but omitting the dust room with its conveying shaft. *Held*, that the reissue is valid for the old claim only; and is not infringed by the use of the fan, spout, meal chest with its conveying shaft, elevator, and dust room, without any conveying shaft in the dust room, or other mechanism performing the same function. *Id.*

14. Reissued letters-patent No. 6673, granted to Mrs. P. Duff, E. A. Kitzmiller, and R. P. Duff, Oct. 5, 1875, for an "improvement in

LETTERS-PATENT (*continued*).

wash-boards," on the surrender of original letters-patent No. 111,585, granted to Westly Todd, as inventor, Feb. 7, 1871, are not infringed by a wash-board constructed in accordance with the description contained in letters-patent No. 171,568, granted to Aaron J. Hull, Dec. 28, 1875. *Duff* v. *Sterling Pump Company*, 636.

15. In view of prior inventions, the claims of the letters-patent granted to Todd must be limited to the form which he shows and describes, namely, projections bounded by crossing horizontal and vertical grooves. They do not cover diamond-shaped projections bounded by crossing diagonal grooves. *Id.*

16. In the field of wash-boards made of sheet metal, with the surface broken into protuberances formed of the body of the metal so as to make a rasping surface, and to strengthen the metal by its shape, and to provide channels for the water to run off, Todd was not a pioneer. He merely devised a new form to accomplish those results; and his letters-patent do not cover a form which is a substantial departure from his. *Id.*

17. Claims 1, 8, 9, 11, 12, 14, 16, and 19 of reissued letters-patent No. 2224, granted April 10, 1866, to Reuben Hoffheins, for an "improvement in harvesters," the original, No. 35,315, having been granted to him May 20, 1862; and claims 1, 2, 6, 7, and 9 of reissued letters-patent No. 2490, granted Feb. 19, 1867, to him, for an "improvement in harvesters," the original, No. 40,481, having been granted to him Nov. 3, 1863, and reissued in two divisions, one, No. 1888, Feb. 28, 1865, and the other, No. 2102, Nov. 7, 1865; and No. 2490 having been issued on the surrender of No. 2102, — considered; and the difference between the specifications and the drawings of No. 35,315 and those of No. 2224, and that between the raking apparatus and rake-support of No. 2224 and those of the defendants, pointed out. *Hoffheins* v. *Russell*, 132.

18. There is no warrant in No. 35,315, for locating the rake-support, or any part of it, on the finger-beam, and as each of the above-named claims of No. 2224 has, as an element, either a rake, or a rake and reel, mounted on, or attached to, the cutting apparatus or the finger-beam, No. 35,315 could not lawfully be reissued with those claims. *Id.*

19. The defendants devised a new arrangement of rake, which made it possible to mount a rake-support on the heel of the finger-beam, where the rake-support of No. 2224 could not be mounted. The difference between the yielding belt-tightener of No. 2224 and their arrangement for driving the raking apparatus pointed out, and the latter held not to be a mechanical equivalent for the former. *Id.*

20. No. 40,481 negatives the idea of mounting the rake-post on the finger-beam, while an element in claim 1 of No. 2490 is the mounting of the raking mechanism on the finger-beam. In No. 2490, a driver's seat mounted on the main frame, so as to enable the driver to ride on the machine while the rake is in operation, is an element in claims 1 and 9, while the driver's seat in No. 40,481 is not, and

LETTERS-PATENT (*continued*).
cannot be, in such a position that the driver can ride on the seat while the rake is in operation. *Id.*
21. The raking apparatus is an element in claims 2, 7, and 9 of No. 2490, and, in view of the differences between the two machines, in the construction of the raking mechanism and the arrangement and location of the rake-post, the rake of claims 2, 7, and 9 is to be construed to be such a rake, and one so arranged, on a rake-post so mounted, as is shown and described in the specification, and thus does not include the defendants' raking mechanism or rake-post. *Id.*
22. The driving device in claims 6 and 7 of No. 2490 held not to include the defendants' driving device, the former being an extensible tumbling shaft and the latter a chain belt with open links, and patentability or invention inhering only in the device, and not in its location. *Id.*
23. No cause of action is established against the defendants on either of the patents sued on. *Id.*

LICENSE TAX. See *Ferry*.

LIMITATIONS, STATUTE OF. See *County; Court of Claims*, 2, 3.

LOUISIANA.
1. By force of the act of the legislature of Louisiana, known as Act No. 8 of 1874, and the constitutional amendment adopted in that year, which provided that bonds should be issued under that act in exchange for valid outstanding bonds and warrants at the rate of sixty cents in the new bonds for one dollar of the old bonds and warrants, the State entered into a formal contract, the obligation of which it was forbidden by the Constitution of the United States to impair, and thereby stipulated with each holder of the new bonds so issued that an annual tax of five and one-half mills on the dollar of the assessed value of all the real and personal property in the State should be levied and collected, and the income therefrom applied solely to the payment of the bonds and coupons; that the tax levied by the act and confirmed by the Constitution should be a continuing annual tax until the bonds, principal and interest, were paid in full; that the appropriation of the revenue derived therefrom should be a continuing annual appropriation; and that no further authority than that contained in the act should be required to enable the taxing officers to levy and collect the tax, or the disbursing officers to pay out the money as collected in discharge of the coupons and bonds. *Louisiana* v. *Jumel*, 711.
2. After the said act of 1874 was passed, and the constitutional amendment sanctioning it was adopted, sundry parties, citizens of another State, exchanged their old bonds for new coupon bonds executed pursuant to the requirements of that act, and demanded of the proper State officers payment of the coupons which fell due Jan. 1, 1880, and the application thereto of the funds collected under the levy imposed by the act. Payment was refused solely on the ground that it was forbidden by the third article of the State Debt Ordi-

LOUISIANA (*continued*).

nance of the new Constitution adopted July 28, 1879, *ante*, p. 715; and the treasurer claimed to hold the funds only for the purposes for which they were appropriated by the terms of that Constitution. The parties then brought in the State court of Louisiana a suit for a *mandamus* against the auditor and treasurer of state and the other members of the board of liquidation, requiring them to apply the funds in the treasury derived from the taxes levied or to be levied to the retirement of the bonds, and to execute the said act according to its intent and purpose. They also brought in the Circuit Court against the same defendants a suit praying for an injunction forbid ding them to recognize as valid said ordinance, and to oppose the full execution of said act and the constitutional amendment. The suit for *mandamus* was removed to the Circuit Court. *Held*, 1. That the ordinance forbade the payment of the interest due January, 1880, and withdrew from the officers of the State the means of carrying her contract into effect. 2. That the execution of the contract cannot be enforced, nor the relief sought be awarded, in a suit to which she is not a party, but which is brought against officers, who are merely obeying the positive orders of the supreme political power of the State. 3. That at the time the bonds were issued or since no statute or judicial decision authorized a suit against Louisiana in her own courts, nor can she be sued in the courts of the United States by a citizen of another State. 4. That the money in her treasury is her property, held by her officers, not in trust for her creditors nor as their agents, but as her servants, and that the courts cannot control them in the administration of her finances, and thus oust the jurisdiction of the political power of the State. *Id.*

MAIL. See *Customs Duties*, 1, 2.

MANDAMUS. See *Attorney; Virginia*, 2, 3.

MARITIME LAW. See *Admiralty; Prize; Wharves and Wharfage.*

1. The master of a vessel can neither sell nor hypothecate the cargo, except in case of urgent necessity; and he can only lawfully do what is directly or indirectly for its benefit, considering the situation in which it has been placed by the accidents of the voyage. *The "Julia Blake,"* 418.

2. The necessity under which he acts is a question of fact, to be determined in each case by its circumstances; and upon his hypothecation of the cargo under his implied authority the lenders are chargeable with notice of the facts on which he appears to rely as his justification, and they must make inquiries and judge for themselves and at their own risk whether the owner, if present, would do or ought to do what, in his absence, the master is undertaking to do for him. Before there can be a recovery against the owner, it must be shown that the circumstances were such as to make it apparently proper for the master to do what he has done. To this extent the burden of proof is clearly on the lenders. *Id.*

MARITIME LAW (*continued*).

3. Where it appears that from the port where the vessel entered in distress the cargo could be forwarded by another vessel, and that it was for the interest of the shipper that it should be so forwarded, instead of being hypothecated to pay for the repairs of the vessel, and that they could not have been effected without an expense to him of very much more than it would cost to reclaim his property, pay all lawful charges on it, and forward it by another vessel, — *Held*, that the master had no authority to pledge the cargo without the consent of the shipper or the consignee. *Id.*
4. Although the bottomry bond cannot be enforced against the cargo, the latter will not be held in that suit for any charges which the vessel may have thereon, where a claim for them is not made in the libel. *Id.*

MARRIAGE. See *Jurisdiction*, 2.

MARYLAND. See *Inspection Laws.*

MASTER AND SERVANT. See *Railroad*, 1.

MEMPHIS AND CHARLESTON RAILROAD COMPANY. See *Causes, Removal of*, 3.

MINERAL LANDS. See *Patent for Land*, 2, 3.

MISSIONARY STATION. See *Oregon*, 1, 2.

MISSOURI. See *Constitutional Law*, 5.

1. By a statute of Missouri, stockholders of a corporation at its dissolution are liable for its debts; but it is provided that no person holding stock as executor, administrator, guardian, or trustee, and no person holding stock as collateral security, shall be personally subject to such liability, but the persons pledging such stock shall be considered as holding the same, and liable; and the estates and funds in the hands of executors, &c., shall be liable. *Held*, 1. That persons to whom a corporation pledges its stock as collateral security are within the exemption of the statute. 2. That certificates of the stock absolute on their face, issued in trust or as collateral security to a creditor, may be shown to be so held by evidence *in pais*. 3. That the person holding such stock in trust, or as collateral security, is not, by his voting thereon, estopped from showing that it belongs to the company, and that he holds it as collateral security. *Burgess* v. *Seligman*, 20.
2. The Supreme Court of Missouri, after the Circuit Court had decided this case, made a contrary decision against the same stockholders, at the suit of another plaintiff, holding that the clause of exemption in the statute does not extend to persons receiving from the corporation itself stock as collateral security. *Held*, that this court is not bound to follow the decision. *Id.*

MORTGAGE. See *Appeal Bond; County; Equity*, 4; *Jurisdiction*, 12; *Receiver; Trust Deed.*

MUNICIPAL BONDS.

1. The township of Montclair in the county of Essex, New Jersey, had authority to issue bonds to be exchanged for bonds of the Montclair Railway Company. *Montclair* v. *Ramsdell*, 147.
2. The Constitution of New Jersey provides: "To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title." *Held*, 1. That this provision does not require the title of an act to set forth a detailed statement, or an index or abstract, of its contents; nor does it prevent uniting in the same act numerous provisions having one general object fairly indicated by its title. 2. That the powers, however varied and extended, which a township may exercise, constitute but one object, which is fairly expressed in a title showing nothing more than the legislative purpose to establish such township. *Id.*
3. The conflict between the Constitution and a statute must be palpable, to justify the judiciary in disregarding the latter upon the sole ground that it embraces more than one object, or that, if there be but one, it is not sufficiently expressed in the title. *Id.*
4. The holder of the bonds is presumed to have acquired them in good faith and for value. But if, in a suit upon them, the defence be such as to require him to show that value was paid, it is not, in every case, essential to prove that *he* paid it; for his title will be sustained if any previous holder gave value. *Id.*
5. The General Assembly of Illinois enacted, March 27, 1869, a statute as follows: "The acts of the city council of the city of Quincy, from June 2, 1868, to August 28, 1868, in ordering an election on the proposition to subscribe $100,000 to the capital stock of the Mississippi and Missouri River Air Line Railroad Company, and the subscription of said stock, and all other acts of said council in connection therewith, are hereby legalized and confirmed." In conformity with the vote of the citizens of Quincy cast at such an election, the council had, by an ordinance of Aug. 7, 1868, subscribed for that amount of said capital stock; but neither the election nor the subscription was authorized by law. After the statute took effect, negotiable coupon bonds were, by virtue of it and the ordinance, issued in the sum of $100,000 to the company, by the city, and the latter received therefore an equal amount of said stock. In a suit by A., a *bona fide* holder of coupons detached from the bonds, — *Held*, that they are valid obligations of the city. *Quincy* v. *Cooke*, 549.
6. The act of the General Assembly of Illinois, approved Feb. 24, 1869, amendatory of an act entitled "An Act to incorporate the Illinois Southeastern Railway Company," approved Feb. 25, 1867, removed the limitation of $30,000 imposed upon the amount which, by the latter act, "any town in any county under township organization is authorized and empowered to donate to said company." *Pana* v. *Bowler*, 529.

MUNICIPAL BONDS (*continued*).

7. The court reaffirms the ruling in *Harter* v. *Kernochan*, 103 U. S. 562, that the duly signed and countersigned township bonds, payable to the company or bearer, which recite that they are duly issued in compliance with the vote of the legal voters of the township, cast at an election held by virtue of the above-mentioned acts of Feb. 25, 1867, and Feb. 24, 1869, are valid in the hands of a *bona fide* holder. *Id.*
8. An irregularity in conducting the election will not defeat a recovery on the bonds, or on the coupons thereto attached, nor overcome the presumption that the plaintiff, in the usual course of business, became at their date the holder of them for value. *Id.*
9. A decree *in personam*, rendered by a court of the State of Illinois, declaring the bonds to be void, does not bind a non-resident holder of them who was not named as a party to the suit and did not appear therein, and who had no notice of the pendency thereof other than by a publication addressed to the "unknown holders and owners of bonds and coupons issued by the town of Pana." *Id.*
10. Coupons after their maturity bear interest at the rate prescribed by the law of the place where they are payable. *Id.*
11. Negotiable coupon-bonds were, without authority of law, issued in October, 1872, by a city in Nebraska, for the purpose of raising money wherewith to construct a high-school building within her limits. They were sold, and the proceeds applied accordingly. The legislature, by an act approved Feb. 18, 1873, *ante*, p. 571, legalized the proceedings of the city in the premises. The Constitution of the State then in force declares that "the legislature shall pass no special act conferring corporate powers," and that "no bill shall contain more than one subject, which shall be clearly expressed in its title." A purchaser of the bonds for full value, without notice of any informality in their issue, to whom the city paid the interest thereon for four years, brought suit to recover the amount of the coupons then due and unpaid. *Held*, 1. That as by force of the transaction the city was bound to refund the moneys he paid it in consideration of its void bonds, and as the act, by confirming them, merely recognizes the existence of that obligation, and provides a medium for enforcing it according to the original intention of the parties, no new corporate powers were thereby conferred. 2. That the title of the act is a full and apt description of its contents. *Read* v. *Plattsmouth*, 568.
12. Under the second section of the act of Nebraska approved Feb. 25, 1875, *ante*, p. 573, the bonds are valid obligations, and neither it nor the said act of Feb. 18, 1873, is in conflict with the Constitution of the State which was then in force. *Id.*

MUNICIPAL CORPORATION. See *Equity*, 4; *Evidence; Ferry*, 1, 3; *Municipal Bonds; Navigable Waters.*

NATIONAL BANKS. See *Criminal Law; United States, Claims by and against.*

1. At the time of borrowing money from a national bank, A. delivered to it, as collateral security for the debt thereby created, the certificate of his shares of its capital stock. On his failure to pay at the stipulated time, the bank sold the stock at its full market value, and applied the entire proceeds to his credit. On the ground that sect. 5201 of the Revised Statutes prohibited a loan by the bank "on the security of the shares of its own capital stock," A. brought an action for the proceeds. *Held*, that he is not entitled to recover. *National Bank of Xenia* v. *Stewart*, 676.
2. Where the holder of shares of stock in a national bank, who is possessed of information showing that there is good ground to apprehend the failure of the bank, colludes with an irresponsible person, with the design of substituting the latter in his place, and thus escaping the individual liability imposed by the provisions of sect. 12 of the act of June 3, 1864, c. 106, and transfers his shares to such person, the transaction is a fraud on the creditors of the bank, and the liability of the transferrer to them is not thereby affected. *Bowden* v. *Johnson*, 251.
3. A bill in equity filed by the receiver of the bank against the transferrer and transferee to enforce such liability will lie where it is for discovery as well as relief, the transfer being good between the parties, and only voidable at the election of the complainant. *Id.*
4. A letter of the Comptroller of the Currency, addressed to the receiver, directing him to bring suit to enforce the personal liability of every person owning stock at the time the bank suspended, is sufficient evidence that the decision of the Comptroller touching such personal liability preceded the institution of the suit. The liability bears interest from the date of the letter. *Id.*
5. The decree below, dismissing the bill, was entered after a new receiver had been appointed. An appeal to this court was taken in the name of the old receiver, as the complainant, the new receiver becoming a surety in the appeal bond. In this court the new receiver was, on his motion, substituted as the complainant and appellant, without prejudice to the proceedings already had; and the motion of the appellees to dismiss the appeal was denied. *Id.*

NAVIGABLE WATERS. See *Ferry; Wharves and Wharfage.*

1. The Chicago River and its branches, although lying within the limits of the State of Illinois, are navigable waters of the United States over which Congress, in the exercise of its power under the commerce clause of the Constitution, may exercise control to the extent necessary to protect, preserve, and improve their free navigation; but until that body acts, the State has plenary authority over bridges across them, and may vest in Chicago jurisdiction over the construction, repair, and use of those bridges within the city. *Escanaba Company* v. *Chicago*, 678.

NAVIGABLE WATERS (*continued*).
2. There is nothing in the ordinance of July 13, 1787, or in the subsequent legislation of Congress, that precludes the State from exercising that authority. *Id.*

NEBRASKA. See *County; Municipal Bonds*, 11, 12.

NEGLIGENCE. See *Railroad*, 1.

NEGROES. See *Civil Rights; Constitutional Law*, 4.

NEW JERSEY. See *Municipal Bonds*, 1–4.

NEW YORK. See *Constitutional Law*, 1, 2.

NON-RESIDENTS. See *Municipal Bonds*, 9; *Tax and Taxation*.

NOTARY PUBLIC. See *Criminal Law*, 6.

NOTICE. See *Jurisdiction*, 18; *Maritime Law*, 2; *Municipal Bonds*, 9; *Trust Deed*, 1.

OFFICER OF THE ARMY.
The rank and pay of retired officers of the army are subject to the control of Congress. *Wood* v. *United States*, 414.

OFFICERS OF NATIONAL BANKS. See *Criminal Law*.

OFFICIAL BONDS. See *Appeal Bond*, 3; *Public Lands*, 2.

OREGON.
1. Under the act of Aug. 14, 1848, c. 177, entitled "An Act to establish the territorial government of Oregon," a religious society acquired no title to public lands by reason of its occupation of them as a missionary station among the Indian tribes, unless such occupation actually existed at that date. *Missionary Society* v. *Dalles*, 336.
2. Where, therefore, a religious society appropriated certain lands in the Territory of Oregon, erected improvements thereon and occupied them for such a missionary station, but its occupation ceased before that date, and a portion of them, after the town-site acts took effect, was, pursuant to their provisions, entered and paid for, and another portion was claimed by a party who had fully complied with the requirements of the act of Sept. 27, 1850, c. 76, commonly called the Donation Act, — *Held*, that the society to which by reason of such occupation a patent had been issued held the title to such portions in trust for the parties claiming respectively under the donation and the town-site acts. *Id.*
3. Prior to the said act of Sept. 27, 1850, no person could, by entry or pre-emption settlement, acquire as against the United States any right or title to public land in Oregon. *Stark* v. *Starrs*, 6 Wall. 402, cited upon this point and approved. *Id.*

PACIFIC RAILROAD ACTS. See *Patent for Land*, 2.

PATENT. See *Letters-patent*.

PATENT FOR LAND. See *Jurisdiction*, 1; *Oregon*, 2; *Pre-emption; Public Lands.*

1. Where a bill was filed in the Circuit Court by the District Attorney in the name of the United States, to vacate a patent for lands, but no objection touching his authority to bring the suit was made, and a duly certified copy of a letter whereby he was directed by the Attorney-General to institute the requisite proceedings was filed here, — *Held*, that the decree for the complainant will not be reversed on such an objection raised here for the first time. *McLaughlin* v. *United States*, 526.
2. The patent in question, bearing date May 31, 1870, and issued to a railroad company, in professed compliance with the terms and conditions of the grant made by the acts commonly known as the Pacific Railroad Acts, covers lands which, the bill alleges, contain valuable quicksilver and cinnabar deposits, and were known to be "mineral lands" when the grant was made and the patent issued. This court, being satisfied that the material allegations of the bill are true, that as early as 1863 and since cinnabar was mined upon the lands, and that at the time of the application for a patent their character was known to the defendant, the agent of the company, who now claims them under it, affirms the decree cancelling the patent and declaring his title to be null and void. *Id.*
3. *Quære*, What extent of mineral, other than coal and iron, found in lands will exclude them from the said grant; and can the United States maintain a suit to set aside a patent, if, before it was issued, the lands therein mentioned were not known to be mineral; and, if so, what are the rights of innocent purchasers from the patentee. *Id.*

PENSION.

By a special act, B. was allowed a pension of fifty dollars per month, which was paid to him until he claimed and received, under a subsequent general act, seventy-two dollars per month. *Held*, that he is not entitled to take under both acts. *United States* v. *Teller*, 64.

PERJURY. See *Criminal Law*, 6.

PERPETUITY. See *Will*, 9.

PLEADING. See *Admiralty*, 1; *Court of Claims*, 3.

POLICE POWER. See *Ferry*, 2.

POOR-FARM. See *County*.

POST-OFFICE. See *Customs Duties*, 1, 2.

PRACTICE. See *Admiralty*, 1; *Appeal; Attorney; Equity Pleading and Practice; Evidence; Jurisdiction; Jury; Letters-patent*, 1, 6; *National Banks*, 5; *Witness*, 2.

PRE-EMPTION. See *Oregon; Patent for Land; Public Lands.*

1. Where the Land Department rejected the claim of a party to preempt a tract of public land, it appearing from the evidence sub-

PRE-EMPTION (*continued*).
mitted that he had previously exercised the "pre-emptive right," — *Held*, that the finding of that fact by the department is conclusive. *Baldwin* v. *Stark*, 463.
2. A person is not entitled, under existing statutes, to more than one such "pre-emptive right," nor, after filing a declaratory statement for one tract, can he file such a statement for another tract. *Id.*

PRIORITY OF PAYMENT. See *Trust Deed*, 1; *United States, Claims by and against.*

PRIZE.
A final decree of acquittal and restitution to the only claimant in a prize cause determines nothing as to the title in the property, beyond the question of prize or no prize; and another person, who actually conducts the defence in the prize cause in behalf and by consent of the claimant, without disclosing his own title under a previous bill of sale from the claimant, is not estopped to contest the claimant's title in a subsequent suit brought by creditors attaching the property or its proceeds as belonging to the claimant. *Cushing* v. *Laird*, 69.

PUBLIC LANDS. See *Oregon; Patent for Land; Pre-emption · Swamp and Overflowed Lands.*
1. The local land-officers are not required to meet and jointly consider the proof of settlement and cultivation offered by claimants under the pre-emption laws. *Potter* v. *United States*, 126.
2. In his accounts with the government, a receiver of public moneys in a land district charged himself with money which he, or, during his absence, his authorized agents, had received as the purchase price of public lands entered pursuant to the pre-emption laws. The United States, on his failure to pay over the money, brought suit on his official bond. *Held*, that neither he nor his sureties can defeat a recovery by setting up irregularities in the proceedings by which the entry of the lands was allowed. *Id.*

PURCHASER IN GOOD FAITH. See *Municipal Bonds*, 4, 5, 7, 8, 11; *Patent for Land*, 3.

RAILROAD. See *Causes, Removal of*, 3; *Tax and Taxation.*
1. The same degree of care which a railroad company should take in providing and maintaining its machinery must be observed in selecting and retaining its employés, including telegraphic operators. Ordinary care on its part implies, as between it and its employés, not simply the degree of diligence which is customary among those intrusted with the management of railroad property, but such as, having respect to the exigencies of the particular service, ought reasonably to be observed. It is such care as, in view of the consequences that may result from negligence on the part of employés, is fairly commensurate with the perils or dangers likely to be encountered. *Wabash Railway Company* v. *McDaniels*, 454.
2. In the absence of a special contract, a railroad company, by receiving cattle for transportation over its own line and other lines therewith

RAILROAD (*continued*).

connected, is only bound to carry the cattle over its own line, and deliver them safely to the next connecting carrier. *Myrick v. Michigan Central Railroad Company*, 102.

3. A contract whereby the liability of the company is sought to be extended beyond such carriage and delivery will not be inferred from loose and doubtful expressions, but must be established by clear and satisfactory evidence. Taking a through fare on the receipt of the cattle does not establish such liability. *Id.*

4. The receipt of the company, *ante*, p. 103, does not of itself constitute such contract. The circumstances under which it was given should have been submitted to the jury, to determine whether in fact a through contract was made. *Id.*

5. In passing upon the rights of the parties, this court will not be controlled by the judicial decisions of the State where the contract of carriage was made. *Id.*

6. A railroad corporation, whose railroad extends across the State of Wisconsin from Lake Michigan to the Mississippi River, and which is authorized, by its charter, to make "such contracts with any other person or corporation whatsoever as the management of its railroad and the convenience and interest of the corporation and the conduct of its affairs may in the judgment of its directors require;" and, by general laws, to make such contracts with any railroad company, whose road terminates on the eastern shore of Lake Michigan, "as will enable them to run their roads in connection with each other in such manner as they shall deem most beneficial to their interest," and "to build, construct, and run, as part of its corporate property, such number of steamboats or vessels as they may deem necessary to facilitate the business operations of such company or companies;" and also "to accept from any other State or Territory of the United States, and use, any powers or privileges applicable to the carrying of persons and property by railway or steamboat in said State or Territory;" has the power, for the purpose of carrying passengers and freight in connection with its own railroad and business, to enter into an agreement with the proprietors of steamboats running, by way of the Great Lakes, between its eastern terminus and Buffalo in the State of New York, by which it guarantees that the gross earnings of each boat for two years shall amount to a certain sum. *Green Bay and Minnesota Railroad Company* v. *Union Steamboat Company*, 98.

RAILROAD COMPANIES, SUBSCRIPTIONS TO THE CAPITAL STOCK OF. See *Municipal Bonds.*

RAILROAD MORTGAGE. See *Receiver.*

REBELLION. See *Court of Claims*, 2; *Jurisdiction*, 13, 14.

RECEIPT. See *Railroad*, 4.

RECEIVER. See *Equity Pleading and Practice; National Banks*, 3–5.

1. Where the complainant prays for the appointment of a receiver of

RECEIVER (*continued*).
mortgaged railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound discretion, may, as a condition of granting the prayer, impose such terms touching the application of the income arising during the receivership to the payment of outstanding debts for labor, supplies, equipment, or permanent improvement of the property, as under the circumstances of the case appear reasonable. *Fosdick* v. *Schall*, 99 U. S. 235, and *Miltenberger* v. *Logansport Railway Company*, 106 id. 286, cited and approved. *Union Trust Company* v. *Souther*, 591.

2. An assignment of such claims as are mentioned in *Union Trust Company* v. *Souther*, p. 591, passes the right of the original holder to payment out of the fund in the hands of the receiver. *Union Trust Company* v. *Walker*, 596.

RECOGNIZANCE. See *Causes, Removal of*, 2.

REGULATION OF COMMERCE. See *Constitutional Law*, 1–4; *Ferry*, 4; *Inspection Laws; Navigable Waters; Wharves and Wharfage.*

REISSUED LETTERS-PATENT. See *Letters-patent.*

REMOVAL OF CAUSES. See *Causes, Removal of.*

RETIRED OFFICERS OF THE ARMY. See *Officer of the Army.*

REVENUE LAWS. See *Causes, Removal of*, 1, 2; *Ferry*, 2.

RIVER. See *Navigable Waters.*

SALE. See *Contract*, 3.

SHIPS AND SHIPPING. See *Admiralty; Maritime Law; Wharves and Wharfage.*

SLAVES. See *Constitutional Law*, 4.

STARE DECISIS. See *Jurisdiction*, 7–11.

STATE AUTHORITY. See *Constitutional Law; Ferry; Inspection Laws; Louisiana; Navigable Waters; Swamp and Overflowed Lands; Wharves and Wharfage.*

STATE BONDS. See *Louisiana; Virginia.*

STATE COURTS. See *Bankruptcy; Causes, Removal of; Jurisdiction*, 1, 2, 5–11; *Louisiana*, 2; *Railroad*, 5.

STATE LAWS. See *Jurisdiction*, 7–11.

STATUTES AND CONSTITUTIONS, CONSTRUCTION OF. See *Corporation*, 2, 3; *Ferry*, 1; *Inspection Laws*, 1, 4; *Jurisdiction*, 7–11; *Louisiana; Missouri; Municipal Bonds*, 2, 3, 5, 6, 11, 12; *Pension; Railroad*, 6; *Virginia; Will*, 2, 6, 10.

STATUTES OF THE UNITED STATES.
The following, among others, referred to, commented on, and explained:—
Ordinance of July 13, 1787. See *Navigable Waters.*

STATUTES OF THE UNITED STATES (*continued*).

1799. March 2. *c.* 23. See *Customs Duties*, 8.
1836. July 4. *c.* 357, sects. 7, 15. See *Letters-patent*, 10.
1839. March 3. *c.* 88, sect. 7. See *Letters-patent*, 10.
1846. July 30. *c.* 74. See *Customs Duties*, 6, 7.
1848. Aug. 14. *c.* 177. See *Oregon*, 1.
1850. Sept. 27. *c.* 76. See *Oregon*, 2, 3.
1850. Sept. 28. *c.* 84. See *Swamp and Overflowed Lands.*
1856. May 15. *c.* 28. See *Swamp and Overflowed Lands*, 3.
1857. March 3. *c.* 98. See *Customs Duties*, 6.
1861. Aug. 5. *c.* 45, sect. 4. See *Court of Claims*, 1.
1864. June 3. *c.* 106, sect. 12. See *National Banks*, 2.
1867. March 2. *c.* 188, sect. 1. See *Customs, Surveyor of.*
1874. June 22. *c.* 391. See *Customs, Surveyor of.*
1875. Feb. 16. *c.* 77. See *Admiralty*, 1; *Appeal*, 4.
1881. Feb. 26. *c.* 82. See *Criminal Law*, 6.
Rev. Stat., sect. 639. See *Jurisdiction*, 5.
" " " 643. See *Causes, Removal of*, 1.
" " " 989. See *Customs, Collector of*, 2.
" " " 2504. See *Customs Duties*, 5.
" " " 2928. See *Customs Duties*, 4.
" " " 3466. See *United States, Claims by and against.*
" " " 5106. See *Bankruptcy.*
" " " 5201. See *Criminal Law*, 5; *National Banks*, 1.
" " " 5209. See *Criminal Law*, 1, 4, 5.
" " " 5211. See *Criminal Law*, 6.

STOCKHOLDERS. See *Corporation; Missouri; National Banks.*

SUBSCRIPTIONS TO STOCK. See *Municipal Bonds.*

SURVEYOR OF CUSTOMS. See *Customs, Surveyor of.*

SWAMP AND OVERFLOWED LANDS.

1. The swamp and overflowed lands granted by the act of Sept. 28, 1850, c. 84, are subject to the disposal of the States wherein they respectively lie, and no party other than the United States can question such disposal or enforce the conditions of the grant. *Mills County* v. *Railroad Companies*, 557.
2. The proviso to the second section of the act, that the proceeds of the lands shall be applied exclusively, as far as necessary, to the purpose of reclaiming the same by levees and drains, imposed an obligation which rests upon the good faith of the States. No trust was thereby attached to the lands, and the title to them, which is derived from either of the States, is not affected by the manner in which she performed that obligation. *Id.*
3. The State of Iowa having granted its swamp and overflowed lands to the counties respectively in which they are situate, Mills County, insisting that certain lands were of this character, made claim thereto. The Burlington and Missouri River Railroad Company claimed them under the act of May 15, 1856, c. 28. These conflict-

SWAMP AND OVERFLOWED LANDS (*continued*).

ing claims gave rise to a suit between the parties, which was decided by the State courts in favor of the county. A writ of error was thereupon brought; and, whilst it was pending here, a compromise was entered into by which the county was to make certain conveyances to the company, and to pay it the sum of $10,000 for lands previously disposed of. Conveyances were executed accordingly. Afterwards, the county instituted suit to have the compromise declared void, and the company sued for the $10,000. The State courts having sustained the compromise, and decided against the county in both suits, writs of error were brought here. *Held*, 1. That the county cannot set up that the lands were disposed of contrary to the provisions of the said act of 1850. 2. That although, after the compromise was made, the writ then pending was submitted to this court, and decided in favor of the county, yet that this did not abrogate the compromise, as the parties continued to act under it; and that the decision of the State court in the present cases is not repugnant to, nor in disaffirmance of, the opinion and judgment of this court. *Id.*

TAX AND TAXATION. See *Appeal Bond*, 1; *County; Ferry; Louisiana; Virginia.*

The court (p. 1) denies an application for rehearing in *United States* v. *Erie Railway Company*, decided at the present term, 106 U. S. 327.

TELEGRAPH EMPLOYÉS. See *Railroad*, 1.

TOBACCO. See *Inspection Laws.*

TONNAGE. See *Ferry*, 4; *Wharves and Wharfage.*

TOWNSHIP BONDS. See *Municipal Bonds.*

TOWN-SITE ACTS. See *Oregon*, 2.

TREASURY DEPARTMENT. See *Customs, Surveyor of.*

TRUST AND TRUSTEE. See *Charitable Gifts and Devises; Corporation*, 3; *County; Criminal Law*, 2–4; *Equity*, 2; *Louisiana*, 2; *Oregon*, 2; *Swamp and Overflowed Lands*, 2; *Trust Deed; Will*, 1, 6, 10–12.

TRUST DEED.

1. By a trust deed, duly recorded, land was conveyed to the trustees in fee, and they were authorized to release it to the grantor upon payment of the negotiable promissory note thereby secured. Before that note was paid or payable, and after it had been negotiated to an indorsee in good faith for full value, a deed of release, reciting that it had been paid, was made to the grantor by the trustees and by the payee of the note, and recorded; and the grantor executed and recorded a like trust deed to secure the payment of a new note for money lent to him by another person, who had no actual notice that the first note had been negotiated and was unpaid, and who, before

TRUST DEED (*continued*).

he would make the loan, required and was furnished with a conveyancer's abstract of title, showing that the three deeds were recorded and the land free from incumbrance. *Held*, that the legal title was in the trustee, under the second trust deed, and that the note thereby secured was entitled to priority of payment out of the land. *Williams* v. *Jackson*, 478.

2. Upon a bill in equity by the holder of a debt secured by deed of trust, to set aside a release negligently executed by the trustee to the grantor, the complainant cannot have a decree for the payment of his debt by the trustee personally. *Id.*

UNITED STATES, CLAIMS BY AND AGAINST. See *Contract*, 2; *Court of Claims; Pension.*

Section 3466 of the Revised Statutes, *ante*, p. 447, which, in certain cases therein mentioned, gives to the United States priority of payment of debts due to it, does not apply to its demands against an insolvent national bank. *Cook County National Bank* v. *United States*, 445.

UNITED STATES, COURTS OF THE. See *Court of Claims; District of Columbia*, 1; *Equity*, 3; *Jurisdiction; Louisiana*, 2.

UNITED STATES MARSHALS. See *Causes, Removal of*, 1, 2.

VERDICT. See *Admiralty*, 1; *Jurisdiction*, 3; *Jury.*

VIRGINIA.

1. By issuing, pursuant to her "funding act" of March 30, 1871, her bonds with interest coupons thereto attached, the State of Virginia entered into a valid contract with every holder of the coupons, whereby she bound herself to receive them at and after their maturity for all taxes and demands due the State. So much of any enactment as forbids the receipt of the coupons for such taxes and demands impairs the obligation of the contract, and is void. *Antoni* v. *Greenhow*, 769.

2. When the coupons were issued, the holder of them could, by the then existing law of the State, as interpreted by her court of last resort, enforce his right under the contract by suing out of that court a *mandamus* compelling the receipt of them by the proper tax-collector, who had refused to accept them when duly offered in payment of State taxes; and the plaintiff, if on the return to the writ judgment was rendered in his favor, could furthermore recover his costs with such damages as a jury might assess, and have forthwith a peremptory writ. By sect. 4 of an act passed Jan. 14, 1882, *ante*, p. 771, when in such a case a *mandamus* is prayed for against the collector, the law imposes upon him as a duty to answer that he is ready to receive the offered coupon as soon as it shall be ascertained to be genuine and legally receivable for taxes. The taxpayer is then required to pay his taxes in lawful money, and file his coupon in the Court of Appeals, by which it is forwarded to the county court of the county, or to the hustings court of the city, where the taxes are payable,

VIRGINIA (*continued*).

with directions to frame an issue as to whether it is genuine and legally receivable for taxes. Each party is entitled to exceptions and an appeal. If the issue is found for the petitioner, a *mandamus* is issued, and the money he paid is to be refunded to him out of the State treasury, in preference to all other claims. *Held*, that said sect. 4 furnishes an adequate and efficacious remedy substantially equivalent to that which existed at the date when the coupons were issued, whereby the rights of the holder of them, in case the collector refuses to receive them for taxes, can be maintained and enforced, and that the obligation of his contract with the State is not thereby impaired. *Id.*

3. The court does not decide whether the act of the legislature, *ante*, p. 779, approved April 7, 1882, after this suit was brought, repeals said sect. 4 of the act of Jan. 14, 1882, but holds that, if such is its effect, the remedy of the taxpayer is not rendered less efficient, inasmuch as the remaining sections furnish a proceeding which is an exact equivalent of that by *mandamus*, the real matter submitted for determination being whether his coupon ought to have been received in payment of his taxes; and if the issue is found for him, the provision is, without further legislative action, sufficient to authorize and require that the money which he deposited for that purpose shall be refunded to him from the State treasury. *Id.*

WATERS. See *Ferry; Navigable Waters; Wharves and Wharfage.*

WHARVES AND WHARFAGE.

1. The city of Parkersburg built within its limits a wharf on the bank of the Ohio River, and prescribed by ordinance certain rates of wharfage on vessels "that may discharge or receive freight, or land on or anchor at or in front of any public landing or wharf belonging to the city, for the purpose of discharging or receiving freight." A transportation company, owning duly enrolled and licensed steamers, which ply between Pittsburgh and Cincinnati and touch at the intermediate points, complained that the wharfage was extortionate, and was merely a pretext for levying a duty of tonnage. The Company thereupon filed a bill in the Circuit Court, praying that the prosecution of a suit brought by the city in the State court to collect the wharfage be enjoined, and that the ordinance be declared void, and for other relief. *Held*, that the character of the charges must be determined by the ordinance itself; and as it on its face imposed them for the use of the wharf only, and not for entering the port or lying at anchor in the river, the court, though it might deem them unreasonable and exorbitant, will not entertain an averment that they were intended as a duty of tonnage, nor inquire into the secret purpose of the body imposing them. *Transportation Company* v. *Parkersburg*, 691.

2. Wharfage is the compensation which the owner of a wharf demands for the use thereof; a duty of tonnage is a charge for the privilege

WHARVES AND WHARFAGE (*continued*).
of entering, or loading at or lying in, a port or harbor, and can be laid only by the United States. *Id.*
3. The question as to which of these classes, if either, a charge against a vessel or its owner belongs, is one, not of intent, but of fact and law: of fact, whether the charge is imposed for the use of a wharf, or for the privilege of entering a port; of law, whether it is wharfage or a duty of tonnage, as the fact is shown to exist. *Id.*
4. Although wharves are related to commerce and navigation as aids and conveniences, yet being local in their nature, and requiring special regulations at particular places, the jurisdiction and control thereof, in the absence of congressional legislation on the subject, properly belong to the States in which they are situated. *Id.*
5. A suit for relief against exorbitant wharfage cannot, as one arising under the Constitution or the laws of the United States, be maintained in the Circuit Court, even though it be alleged that the wharfage was intended as a duty of tonnage; the alleged intent not being traversable. *Id.*

WILL. See *Gift*, 2.
1. In a will containing many legacies, bequests, and devises, each present and immediate in form, to individuals and to charitable institutions, a clause expressing a wish and direction that none of the legacies, bequests, or devises "shall be executed or take effect until" a certain memorial hall (in fact nearly finished at the time of the execution of the will and of the testator's death) on land previously conveyed by the testator in trust, "shall be completed and entirely paid for out of my estate," does not suspend the vesting, but only the payment and carrying out of the various legacies, bequests, and devises. *Jones* v. *Habersham*, 174.
2. Section 2419 of the Code of Georgia of 1873 does not invalidate a charitable devise contained in a will executed within ninety days before the testator's death, unless he leaves a wife or child or descendants of a child. *Id.*
3. The validity of a charitable devise as against the heir at law depends upon the law of the State where the land lies. *Id.*
4. The validity of a charitable bequest as against the next of kin depends upon the law of the State of the testator's domicile. *Id.*
5. The law of charities is fully adopted in Georgia, as far as is compatible with a free government where no royal prerogative is exercised. *Id.*
6. A parcel of land, with buildings thereon, was devised to the trustees of the Independent Presbyterian Church in Savannah, an incorporated religious society, "upon the following terms and conditions, and not otherwise:" 1st. That the trustees should appropriate annually out of the rents and profits the sum of $1,000 "to one or more Presbyterian or Congregational Churches in the State of Georgia in such destitute and needy localities as the proper officers of said Independent Presbyterian Church may select, so as to promote the cause

WILL (*continued*).

of religion among the poor and feeble churches of the State." 2d. That the trustees should not materially alter the pulpit or galleries of the present church edifice, or sell the lot on which the Sabbath-school room of the church stood. 3d. That the trustees should keep in order the burial place of the testator, which he devised to them for that purpose. *Held*, that under the Code of Georgia of 1873, sect. 3157, the charitable purposes named in the first and third conditions were good charitable uses, sufficiently defined; that the trustees were capable of taking the devise, and that its validity was not impaired by the conditions subsequent. *Id.*

7. A devise to a society incorporated "for the relief of distressed widows and the schooling and maintaining of poor children," of buildings and land, to "use and appropriate the rents and profits for the support of the school and charities of said institution, without said lot being at any time liable for the debts or contracts of said society," is a good charitable devise. *Id.*
8. A devise to a society incorporated "for the relief of indigent widows and orphans in the city of Savannah," of buildings and land, "the rents and profits to be appropriated to the benevolent purposes of said society," is a good charitable devise. *Id.*
9. The rule against perpetuities does not apply to charities; and if a devise is made to one charity in the first instance, and then over, upon a contingency which may not take place within the limit of that rule, to another charity, the limitation over to the second charity is good. *Id.*
10. A devise to a historical society of a house containing a collection of books, documents, and works of art, in trust to keep and preserve the same, with the collection therein, and other books and works of art to be purchased by the officers of the society out of the income of a fund bequeathed by the devisor for the purpose, "as a public edifice for a library and academy of arts and sciences," and "to be open for the use of the public" on such terms and under such reasonable regulations as the society may prescribe, is a good charitable devise, and is not invalidated by a requirement to place and keep over the entrance a marble slab with the name of the testator engraved thereon; and if the society is incapable of executing the trust, a court of equity, in the exercise of its ordinary jurisdiction, and under sect. 3195 of the Code of Georgia of 1873, may appoint a new trustee. *Id.*
11. A devise and bequest in trust for the building, endowment, and maintenance of "a hospital for females within the city of Savannah, on a permanent basis, into which sick and indigent females are to be admitted and cared for in such manner and on such terms as may be defined and prescribed by" certain directresses named and their associates, who are to obtain an act of incorporation for the purpose, is a valid charitable devise and bequest, although no time is limited for the erection of the building or the obtaining of the charter. *Id.*

WILL (*continued*).

12. A bequest "to the first Christian church erected or to be erected in the village of Telfairville in Burke County, or to such persons as may become trustees of the same," is a good charitable bequest. *Id.*

WITNESS.

1. A person affected with insanity is admissible as a witness, if it appears to the court, upon examining him and competent witnesses, that he has sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue. *District of Columbia* v. *Armes*, 519.
2. A witness was, on cross-examination, asked if he had not stated to different parties that he wished the plaintiffs to recover, as he would then get his pay. An objection to the question was made, and the defendant's counsel then declared that he did not propose to impeach the witness. *Held*, that the objection was properly sustained. *Oil Company* v. *Van Etten*, 325.

WORDS.

"Cotton." See *Barber* v. *Schell*, 617.
"Exports." See *People* v. *Compagnie Générale Transatlantique*, 59.
"Final judgment." See *Schell* v. *Cochran*, 625.
"Imports." See *People* v. *Compagnie Générale Transatlantique*, 59.
"Inspection laws." See *People* v. *Compagnie Générale Transatlantique*, 59.
"Migration." See *People* v. *Compagnie Générale Transatlantique*, 59.

WRECK. See *Customs Duties*, 4.

WRIT OF ERROR. See *Bankruptcy*; *District of Columbia*, 2; *Jurisdiction*, 4.

WRITTEN INSTRUMENTS. See *Contract*; *Will*.

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